Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

SABRI I. SAMIRAH,

Petitioner,

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES; CYNTHIA J. O'CONNELL, INTERIM DISTRICT DIRECTOR FOR INTERIOR ENFORCEMENT, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that § 1252(a)(2)(B) precludes jurisdiction over pure constitutional and statutory claims challenging the government's interpretation of 8 U.S.C. § 1225A, where no other route of appeal is possible?

2. Did the Court of Appeals err in finding that an individual excluded from the United States in violation of the statute and the Constitution is not in custody for purposes of a writ of habeas corpus?

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The order of the Seventh Circuit Court of Appeals denying rehearing en banc (App. C, *infra*, 16a) is unreported. The opinion of the Seventh Circuit Court of Appeals, *Samirah v. O'Connell*, (App. A, *infra*, 1a-12a) reversing the district court's grant of a preliminary injunction is reported at 335 F.3d 545 (7th Cir. 2003).[1] The order of the District Court for the Northern District of Illinois granting a preliminary injunction, *Samirah v. Ashcroft, et. al.*, No. 03-C-1298, slip op. (N.D. Ill. March 25, 2003) (App. D, *infra*, 17a) is unreported. The transcript of the proceedings before the district judge contain the opinion granting petitioner a preliminary injunction and are included herein at App. E, *infra*, 18a-28a.

JURISDICTION

On July 2, 2003, the Seventh Circuit Court of Appeals entered an order reversing the preliminary injunction entered in this case by the district court on March 25, 2003. Dr. Samirah filed a timely Motion for Rehearing and Suggestion for Rehearing En Banc. On October 30, 2003, the Court of Appeals denied that motion. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 4 of the Constitution is reproduced verbatim at App. I, *infra*, 42a. The Fifth Amendment of the Constitution is reproduced verbatim at App. I, *infra*, 43a. The Fourteenth Amendment of the Constitution is reproduced verbatim at App. I, *infra*, 44a-45a.

The following provisions of the United States Code: 8 U.S.C. §§ 1225, 1225a, 1228, 1229a, 1229b, 1252; 28

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[1] For purposes of this petition, petitioner's cites to Appendix A for references to the 7th Circuit's opinion in *Samirah v. O'Connell*.

U.S.C. § 1254 are reproduced in the appendices at App. J, *infra*, 60a-99a.

The following provisions of the Code of Federal Regulations: 8 C.F.R. §§ 1.1, 245.2, 245.6 are reproduced in the appendices at App. J, *infra*, 100a-112a.

STATEMENT OF THE CASE

Sabri Ibrahim Samirah, a citizen of Jordan, has lived in this country for the past fifteen years. App. E, *infra*, 19a. Since coming to the United States in 1987, he has earned two graduate degrees and has been a prominent figure in the Muslim and Arab American communities. Dr. Samirah and his family were domiciled in Orland Park, Illinois. His wife, Mrs. Sima Srouri, taught Arabic and Islamic studies at Universal School in Bridgeview, Illinois. The couple has three sons, ages twelve, ten, and three, who are United States citizens. *See* App. E, *infra*, 21a.

In September 2002, Dr. Samirah and his wife, through their immigration attorney, filed an application for Adjustment of Status to that of a Legal Permanent Resident of the United States (LPR). Dr. Samirah was eligible to apply for Adjustment of Status because the INS had approved an immigrant petition filed by his wife's employer. Dr. Samirah was permitted to apply as a "derivative" applicant, meaning that his ability to obtain LPR status was conditioned on his wife actually obtaining LPR status through her employer. *See* INA § 203(d), 8 U.S.C. § 1153(d); App. J, *infra*, 46a, 58a.

At the same time, Dr. Samirah also filed Form I-131, Application for Advance Parole, for the purpose of traveling to Jordan to visit his ill mother. During the pendency of the application for Adjustment of Status, an applicant is permitted to travel outside the United States only with such advance authorization; any other travel results in the Adjustment application being considered "abandoned." *See* 8 C.F.R. § 245.2(a)(4)(ii)(B); App. J, *infra*, 104a-108a. On

December 4, 2002, the government granted Dr. Samirah's Application for Advance Parole, and accordingly the government issued an advance parole document (Form I-512L) to Dr. Samirah. *See* App. G, *infra*, 30a-31a.

Dr. Samirah departed the United States on December 28, 2002, with his I-512L form in hand. It states that he will be allowed to resume his application for Adjustment of Status unless found inadmissible under applicable immigration laws and regulations:

> NOTICE TO APPLICANT: Presentation of this authorization will permit you to resume your application for adjustment of status upon your return to the United States, if otherwise admissible under the Act. If your adjustment application is denied, you may be subject to removal proceedings under sections 235(b)(1) or 240 of the Act.

Id. Sometime after Dr. Samirah departed from the United States, the government learned that Dr. Samirah was not in the United States and decided to revoke his advance parole before he could return. During Dr. Samirah's return trip home from Jordan he was stopped for a layover in Shannon, Ireland. There Dr. Samirah met with INS officials at an INS preinspection station. The officials presented Dr. Samirah with a copy of a two-sentence fax, signed one day earlier by Brian Perryman, Chicago District Director of INS. *See* App. F, *infra*, 29a. This document informed Dr. Samirah that the district director had revoked Dr. Samirah's advance parole, stating that "the INS has received information indicating that you are a security risk to the United States and therefore, your advance parole authorization is hereby revoked." *Id.* INS officials then denied Dr. Samirah reentry into the United States, preventing Dr. Samirah from going home to be with his wife and his sons.

On February 20, 2003, Dr. Samirah filed a Complaint against John Ashcroft, Attorney General of the United States,

Brian Perryman, as Chicago District Director, Immigration and Naturalization Service,[2] the Immigration and Naturalization Service, and the United States Department of Justice (referred to collectively herein as "defendants", "government" or "INS"). He sought declaratory and injunctive relief against the defendants for their continued refusal to follow the procedures outlined in the Immigration and Nationality Act ("INA") and their own administrative regulations. The next day, February 21, 2003, Dr. Samirah filed a Motion for Preliminary Injunction and Request for a Hearing seeking to have the case adjudicated in an expedited fashion so that Dr. Samirah could be back in the United States before March 28, 2003.[3] At a hearing on February 25, 2003, the government indicated that it would move to dismiss on jurisdictional grounds, and that it saw no need to decide the case before March 28, 2003; the district court ordered the government to address both the jurisdictional issues and the effects of Dr. Samirah's absence from the country past March 28, 2003. On March 11, 2003, the government filed a Motion to Dismiss Complaint and Petition For Writ of Habeas Corpus and Memorandum in Support. On March 18, 2003, Dr. Samirah filed his Response. At a hearing on March 20, 2003, the government represented that the ninety-day reentry window could not be waived. The court therefore ordered the

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[2] Since the filing of the Complaint, Mr. Perryman has resigned his position as district director. Further, on March 1, 2003, the Immigration and Naturalization Service became part of the Department of Homeland Security with a new name, the Bureau of Immigration & Customs Enforcement.

[3] March 28, 2003, was a crucial date by which Dr. Samirah needed to return because, had he been prevented from returning, he would have been outside the United States for more than ninety days and lost rights under 8 U.S.C. § 1229b(d)(2). *See* App. J, *infra*, 94a. In granting the government's Motion for Stay Pending Appeal, the Court of Appeals held that the ninety-day requirement of 8 U.S.C. § 1229b(d)(2) was equitably tolled. *See* App. B, *infra*, 14a.

government to respond to any and all issues by March 24, 2003, and informed the parties that it intended to render a decision on the preliminary injunction request on March 25, 2003. On March 24, 2003, the government filed its Reply to Dr. Samirah's Response.

On March 25, 2003, the district court granted Dr. Samirah's motion for preliminary injunction and ordered the defendants to arrange for the issuance of any and all documents necessary to permit Sabri Samirah to enter the United States on or before March 28, 2003. *See* App. D, *infra*, 17a. The next day, the government filed an Emergency Motion for Stay Pending Appeal and Notice of Emergency Appeal with the Seventh Circuit Court of Appeals, and Dr. Samirah filed a Motion in Opposition to Stay of Enforcement of the district court's order. Later that day, the Court of Appeals granted the government's Motion for Stay Pending Appeal, but "construed [the government's motion] as a government waiver of the 90 day period of 8 U.S.C. § 1229b(d)(2)," (App. B, *infra*, 14a), meaning that if Dr. Samirah prevailed, he would be held harmless from the resulting additional time outside the country.

After expedited briefing, the case was set for argument on June 5, 2003. The Seventh Circuit issued a published decision on July 2, 2003, reversing the decision of the district court, and finding that the federal courts entirely lacked jurisdiction over the cause of action. *See* App. A, infra, 1a-12a. Dr. Samirah filed a timely Motion for Rehearing and Suggestion for Rehearing En Banc on July 15, 2003, which was denied without opinion on October 30, 2003. *See* App. C, *infra*, 16a.

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT'S HOLDING THAT 8 U.S.C. § 1252(A)(2)(B) PRECLUDES REVIEW OF STATUTORY AND CONSTITUTIONAL CLAIMS GOES AGAINST THE WEIGHT OF JUDICIAL AUTHORITY, CREATING A CIRCUIT SPLIT.

In proceedings below, the district court determined that the agency had violated Dr. Samirah's constitutional rights by excluding him without process. The court found that Dr. Samirah's fifteen years of lawful presence in the United States entitled him to the protections of the Constitution: "[T]he government cannot short-circuit the rights of an alien who has long lived in the United States by revoking his parole and then treating him as if he had never been here at all." App. E, *infra*, 23a-24a. The court held that Dr. Samirah is entitled to the right of due process, consisting of notice and a hearing, prior to being excluded from this country.

The district court therefore found it unnecessary to address Dr. Samirah's statutory claims that Congress had not authorized the exclusion of aliens except by the provisions set forth in the statute. Dr. Samirah clearly was not challenging the discretionary action of the government to revoke his parole. Indeed, Dr. Samirah's primary challenge has been to the government's act of excluding him without a hearing, which is separate and independent from his advance parole. He challenged the advance parole revocation only to the extent that the court upheld his exclusion as flowing automatically from that revocation, and then only to the extent that it was barred by the Constitution.

The Seventh Circuit declined to address any of Dr. Samirah's statutory or constitutional claims. The Court of Appeals held instead that 8 U.S.C. § 1252(a)(2)(B) barred the district court from addressing any claims, including purely constitutional and statutory claims. *See Samirah v.*

O'Connell, 335 F.3d 545, 552 (7th Cir. 2003); App. A, *infra*, 12a. The Court's blanket preclusion of judicial review constitutes an unprecedented situation in which the courts are barred from protecting constitutional rights. Dr. Samirah is not challenging the government's discretionary actions; rather, his claims address a deprivation of due process, and he therefore asks this Court to examine the means by which he was excluded. Declining to address these substantial constitutional and statutory questions on the merits, the Seventh Circuit held *sub silentio* that § 1252(a)(2)(B) could preclude all review of these decisions. This decision is at odds with the weight of authority considering this issue.

Prior to *Samirah*, the Seventh Circuit addressed the effects of § 1252(a)(2)(B) in a number of cases and always interpreted the statute to permit review of constitutional questions and questions of pure law. *See Kharkhan v. Ashcroft*, 336 F.3d 601, 604-606 (7th Cir. 2003) (finding jurisdiction over plaintiff's due process claims); *Ahmed v. Dept. of Homeland Security*, 328 F.3d 383, 386-87 (7th Cir. 2003) (rejecting mandamus claim on merits rather than lack of subject-matter jurisdiction under § 1252(a)(2)(B)); *Iddir v. INS*, 301 F.3d 492, 499 (7th Cir. 2002) (permitting mandamus action). In *Iddir*, the Court of Appeals applied traditional tools of statutory construction and held that use of the terms "judgment" and "decision or action" only bars review of discretionary decisions specifically denying or granting relief, not barring review of constitutional or statutory challenges. *Iddir*, 301 F.3d at 497. This prior approach of the Seventh Circuit was consistent with the approach of the Supreme Court and the other circuits to address this question. The decision in *Samirah* rejects this interpretation and creates a circuit court split on this matter.

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), this Court considered an argument that § 1252(a)(2)(B) barred its consideration of the Attorney General's release determination. The Court disagreed: "[t]he aliens here . . . do not seek

review of the Attorney General's exercise of discretion; rather, they challenge the extent of the Attorney General's authority . . . [a]nd the extent of that authority is not a matter of discretion." *Id.* at 688. There is no indication that this Court's holding regarding § 1252(a)(2)(B) was limited to the habeas context. Like the plaintiffs in *Zadvydas*, Dr. Samirah does not challenge the Attorney General's discretion to exclude him from the country; he challenges the constitutionality of this discretion to the extent it violates due process by excluding him without notice and a chance to be heard.

Aside from this Court, this matter has been addressed by the Second, Third, Fifth, Ninth, Tenth and Eleventh Circuits. All have held that § 1252(a)(2)(B) does not preclude jurisdiction over statutory or constitutional claims. *Mireles-Valdez v. Ashcroft*, 349 F.3d 213, 217 (5th Cir. 2003) (reviewing the due process claims on the merits, holding that the court has jurisdiction to review an issue of statutory interpretation); *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176, 178 (3rd Cir. 2003) (holding that § 1252(a)(2)(B) removes jurisdiction for denials of discretionary relief only); *Nolan v. Holmes*, 334 F.3d 189, 194 (2nd Cir. 2003) (holding that review of a purely legal challenge is not precluded by § 1252(a)(2)(B)); *Gonzalez-Oropeza v. U.S. Attorney General*, 321 F.3d 1331, 1333 (11th Cir. 2003) (stating, "[n]otwithstanding this jurisdictional bar . . . § 1252(a)(2)(B) allows review of substantial constitutional challenges to the INA"); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137 (9th Cir. 2002) (allowing review of a statutory interpretation challenge as a pure question of law not subject to § 1252(a)(2)(B) preclusion); *Sierra v. INS*, 258 F.3d 1213, 1217 (10th Cir. 2001) (holding that review of constitutional challenges is not precluded under § 1252(a)(2)(B)).

The government clearly has the right to make discretionary decisions regarding the exclusion or removal of aliens, and the courts rightfully must pay deference to that discretion. But Dr. Samirah, like the plaintiff in *Sierra*, is challenging the

constitutionality of the government's procedures or lack thereof in making these discretionary decisions. "It is never within the Attorney General's discretion to act unconstitutionally." *Sierra*, 258 F.3d at 1217. Denial of notice and a hearing before exclusion violates Dr. Samirah's due process rights and is therefore unconstitutional.

Dr. Samirah is asking this Court to maintain precedent created and upheld by it and the circuit courts. The circuit courts addressing this issue have interpreted § 1252(a)(2)(B) narrowly and consistently with the strong presumption in favor of judicial review.

> We read § 1252(a)(2)(B)(i)'s language narrowly, construing any ambiguities in its language in favor of Ramirez-Perez and in favor of judicial review. Whether the BIA's interpretation of the hardship standard violates due process is not a "judgment regarding the granting of" cancellation of removal relief. Rather, it presents a question of statutory construction. Thus, we conclude that § 1252(a)(2)(B)(i) does not preclude our review of Ramirez-Perez's constitutional claim.

Ramirez-Perez v. Ashcroft, 336 F.3d 1001, 1005 (9th Cir. 2003) (reaching statutory and constitutional claims relating to hardship prong of cancellation case) (citations omitted).

The Seventh Circuit's decision clearly conflicts with the overwhelming weight of judicial authority, which holds that § 1252(a)(2)(B) precludes jurisdiction only over challenges to discretionary determinations and not over statutory or constitutional challenges. There is a presumption in favor of judicial review of constitutional claims and it is "distasteful to suppose that an administrative agency would claim to receive from Congress . . . a license to ignore the Constitution." *Czerkies v. U.S. Dept. of Labor*, 73 F.3d 1435, 1442 (7th Cir. 1996) (stating that door-closing statutes are often interpreted as being inapplicable to constitutional challenges). The Seventh Circuit decision creates a circuit split on this issue.

The Supreme Court is the only appropriate body to resolve this conflict.

II. DR. SAMIRAH'S EXCLUSION FROM THE UNITED STATES VIOLATES DUE PROCESS.

The Constitution secures the right to procedural due process where government action deprives individuals of life, liberty, or property. U.S. Const. Amend. V, XIV. The fundamental tenet of due process is the right to a hearing of some kind, dependent upon the careful balance of three factors: the liberty interest involved, the utility of additional procedures in facilitating justice, and the burden imposed upon the government. *See Mathews v. Eldridge*, 424 U.S. 319, 332-333 (1976). In *Eldridge* the Court articulated this balancing approach:

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

Dr. Samirah has been exiled from his home in the United States for over one year, never having received a hearing as to the subject of his exclusion or basis for the government's refusal to allow him to return to this country. Irrespective of the government's authority unilaterally to revoke a decision to grant advanced parole, Dr. Samirah cannot be deprived of his residence in the United States without some process through which he may be heard in his defense. He has developed "the ties that go with permanent residence" that afford him constitutional protections beyond those of an alien seeking "initial admission." *See Landon v. Plasencia*, 459

U.S. 21, 32-33 (1982). Consequently, he has a substantial liberty interest in returning to the United States. *Id.; see also Reno v. Flores*, 507 U.S. 292, 306 (1993); *Chin Yow v. U.S.*, 208 U.S. 8, 13 (1908) (establishing the right to a fundamentally fair hearing in exclusion proceedings); *The Japanese Immigrant Case*, 189 U.S. 86, 100-01 (1903); (establishing a right to due process in deportation proceedings). The government's unilateral exclusion of Dr. Samirah, aptly termed by the district court as a "short-circuit" of his rights, clearly deprives him of this liberty interest. As such, his due process rights have been violated, and he is entitled to a hearing through which he may challenge the actions of this government to ensure that he is not "treated as if he had never been here at all." *See* App. E, *infra*, 24a.

Dr. Samirah was following the necessary procedures that would lead him to an official Adjustment of Status. He left the United States with the permission of the government and under the expectation that he could return to the United States and retain his place in the adjustment process.[4] The government precluded Dr. Samirah from returning to his home and family and has caused him to lose his place in the adjustment process. Dr. Samirah's status remains essentially in administrative limbo. The government's action cannot withstand constitutional scrutiny; it ignores the fundamental premise that one with rights in this country must have access to the courts to vindicate those rights.

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[4] The Advance Parole Authorization (I-512L) stated on its face, Dr. Samirah "was authorized to depart the United States temporarily for bona fide business or personal reasons and intends to return to the United States to await the adjudication of his/her application for adjustment of status." App G, *infra*, 30a.

A. Dr. Samirah has substantial liberty interests at stake and is entitled to a hearing on the subject(s) of his exclusion.

Although Dr. Samirah is not physically present in the United States, he has substantial liberty interests and property interests in this country. Dr. Samirah lives in Orland Park, Illinois and has been living in the United States for the past fifteen years. At the moment of his departure, his wife, his children, his home, and his job were here in the United States. Moreover, he has constitutional rights to due process regarding his application for residency, filed prior to his departure, and his *de facto* removal from the country. He has those ties that afford him constitutional protection:

> This Court has long held that an alien seeking *initial* admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative . . . however, *once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.*

Landon v. Plascencia, 459 U.S. 21, 32-33 (1982) (emphasis added) (citations omitted); *see also Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (once an alien enters this country, his legal status changes); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (stating: "[i]t is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 600-01 (1953) (holding that a returning alien is "entitled to due process without regard to whether or not, for immigration purposes, he is treated as an entrant alien . . . . His status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him."); *United*

States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (stating: "[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country").

The government argues below that Dr. Samirah lacks the connections to the United States that confer liberty interests sufficient to invoke constitutional protection. Relying on *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950) and *Al Odah v. United States*, 321 F.3d 1134, 1140 (D.C. Cir. 2003), the government's position is that Dr. Samirah lacks "entitlement to constitutional protection" because he has "no presence in this country." *Al Odah*, 321 F.3d at 1140. The government characterizes Dr. Samirah as an "unadmitted alien" not in the custody of the United States and therefore outside the scope of due process. According to the government, the court must disregard the fact that Dr. Samirah established a prominent career with substantial ties to his community, and more importantly made a home for himself and his family in the United States. The government wholly ignores the fact that Dr. Samirah left this country with the government's permission and the expectation that he could return without jeopardizing his application for residency. The government argues that Dr. Samirah forfeits whatever rights he had because denial occurred outside the territorial boundaries of the United States. The government ignores the reality that Dr. Samirah left the United States with permission and was denied reentry at a preinspection station. This position cannot be reconciled with traditional notions of fair play and substantial justice. *See, e.g., Colding,* 344 U.S. at 600-01. The government may not deny him the benefits and protections of the Constitution unilaterally by barring him from his home without any formal notice, hearing, or other forum through which he can assert his rights.

B. Dr. Samirah's exclusion without notice and hearing violates due process and is a clear deprivation of his liberty interest.

The government excluded Dr. Samirah without reference to any lawful proceedings and under the auspice that revocation of advanced parole is within the province of the Executive Branch's authority to exercise discretionary power and is not subject to review. Irrespective of the Attorney General's discretionary power, Dr. Samirah retains his right to due process where government action encroaches upon his liberty interests. Without a forum, he can ascertain neither the exact reason he is being denied reentry into the United States nor the status of his application for adjustment. To withstand constitutional scrutiny under the Due Process Clause, procedure must govern the manner in which such discretion is exercised notwithstanding the fact that the ultimate decision may not be subject to review. Here, there is a fundamental absence of procedure. Dr. Samirah has been exiled from this country and denied access to our courts because the ultimate decision lay within the ostensible discretion of the executive power. Due process requires, at least in the case of a returning long-time resident of the United States who left temporarily with government permission, some kind of notice and opportunity to be heard before being excluded from the country. Exclusion without any process violates norms of fundamental fairness and constitutes manifest injustice.

III. THE EXECUTIVE MAY NOT DISREGARD A CONGRESSIONAL STATUTE.

The Seventh Circuit's decision presents, in addition to the difficult jurisdictional problems outlined above, grave matters relating to the separation of powers between the Executive and the Legislative Branches. The Seventh Circuit held that the Executive's actions were discretionary, even if the exclusion process adopted by the Executive agency was in contravention of the statute. *Samirah v. O'Connell*, 335 F.3d

at 348-49; App. A, *infra*, 6a. Particularly in light of the Constitution's clear grant of authority to Congress to control the immigration process, such a holding raises troubling separation of powers problems and should be reversed.

A. Congress has the Constitutional authority to regulate immigration.

The power of Congress to exclude or admit aliens has been held to flow both from sovereignty itself, *see, e.g., The Chinese Exclusion Case*, 130 U.S. 581 (1889), and from the power "[t]o establish an uniform Rule of Naturalization." U.S. Const., art. I, sec 8, cl. 4.; App. I, *infra*, 42a. This Court has long recognized "Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Kleindienst v. Mandel,* 408 U.S. 753, 766 (1972) (citation omitted) (internal quotation marks omitted).

While numerous cases have upheld the delegation of Congressional power to the Executive Branch, *see, e.g., United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537, 541 (1950) (Congress permitted Executive broad authority to exclude any alien deemed "prejudicial to the interests of the United States"); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892), no case has ever held that the Executive may act in direct contravention of a statute duly passed into law by Congress. The "plenary power doctrine" recognizes that Congress does not act alone in the immigration context, but the role of the Executive is to enforce the immigration laws passed by Congress, not to overturn those rules. "The power to exclude or to expel aliens... is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established." *Fong Yue Ting v. United States,* 149 U.S. 698, 713 (1893).

Congress takes the lead role in immigration matters, specifying by legislation the manner in which the Executive will act to regulate aliens. "Normally Congress supplies the

conditions of the privilege of entry into the United States." *United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537, 543 (1950).

Dr. Samirah argued below that Congress had done so here, providing clear rules for the exclusion of individuals like Dr. Samirah, which the government ignored. This executive action was a constitutional encroachment upon Congressional authority. It is incumbent on the Executive to execute Congressional mandates; not to write its own immigration policy.

B. Congress did not create a new procedure for determining admissibility when it enacted INA § 235A.

Section 240 of the INA provides that "[u]nless otherwise specified in this chapter, proceedings under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." INA § 240(a)(3), 8 U.S.C. § 1229a(a)(3). In § 240 proceedings, "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien." INA § 240(a)(1), 8 U.S.C. § 1229a(a)(1). This statutory language is the starting point of the analysis of this case. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("The starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."). In the absence of a congressionally-established mechanism, other than § 240, for determining the admissibility of an alien whose advance parole has been revoked at an INS preinspection station, the government may not bar Dr. Samirah from the United States unless the government complies with the requirements of INA § 240.

The government claims to have found this "extra-Congressional" procedure in INA § 235A, 8 U.S.C. § 1225a, which reads, in pertinent part:

> (1) New stations. Subject to paragraph (5), not later than October 31, 1998, the Attorney General, in consultation with the Secretary of State, shall establish and maintain preinspection stations in at least 5 of the foreign airports that are among the 10 foreign airports which the Attorney General identifies as serving as last points of departure for the greatest numbers of inadmissible alien passengers who arrive from abroad by air at ports of entry within the United States. Such preinspection stations shall be in addition to any preinspection stations established prior to September 30, 1996.

App. J, *infra*, 69a. According to the government, because Dr. Samirah did not take a direct flight from Jordan to the United States and thereby passed through a preinspection station, he was entitled only to "preinspection review" under INA § 235A, 8 U.S.C. § 1225a.

As part of INA § 235A, Congress passed specific procedures for expedited removal. See, INA § 235(b), 8 U.S.C. § 1225(b) (expedited removal); INA § 235(c), 8 U.S.C. § 1225(c) (expedited removal of terrorists); INA § 238(b), 8 U.S.C. § 1228(b) (administrative removal of aggravated felons).[5]

Even a cursory comparison of INA § 235A with the three alternate procedures shows that INA § 235A is not meant to be a separate removal proceeding. Nothing in INA § 235A purports to provide any particular process at preinspection stations. INA § 235A includes no limitations, and as the government conceded below, it could summarily exclude even Lawful Permanent Residents or United States citizens

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[5] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 302, 110 Stat. 3009, (Sept. 30, 1996), at the same time as INA § 235A.

(if the authenticity of their passport were doubted, for example) without any kind of hearing, arguing that U.S. citizens who were so excluded could bring actions in federal court to challenge this exclusion. Such a reading is plainly untenable. See, INA § 235A, 8 U.S.C. § 1225a. The text of the statute leaves no doubt that INA § 235A is a venue provision and does not alter either the substantive immigration law or the otherwise available procedures for determining inadmissibility.

By its terms, INA § 235A relates only to venue. It says nothing about the process to be provided at a preinspection station. 8 U.S.C. § 1225a. In the face of INA § 240(a)(3), 8 U.S.C. § 1229a(a)(3), which requires INA § 240 proceedings in the absence of statutory guidance to the contrary, the government argues that INA § 235A gives it, the Executive Branch, implicit authority to create an alternate process for excluding individuals from the United States. 8 U.S.C. § 1225a. This is both wrong and dangerous.

The clear language of Congress should end the discussion. *United States v. Silva*, 140 F.3d 1098 (7th Cir. 1998) (if the language of the statute is unambiguous, the court need not resort to the legislative history); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (agency's interpretation of statutes must give effect to the unambiguously expressed intent of Congress). However, examining the legislative history of both statutes, it becomes evident that the creation of preinspection stations does not supplant the requirements of INA § 240. 8 U.S.C. § 1229a. When Congress enacted INA § 240(a)(3)—simultaneously enacting INA § 235A—it clearly explained that INA § 240 would govern *all* removal proceedings except for the codified exceptions, none of which were invoked in Dr. Samirah's case. H.R. Conf. Rep. No. 104-828 104th Cong., 2nd Sess. 1996 (available at 1996 WL 563320

at *211).[6] The Conference report did not list INA § 235A as being among the alternate procedures to INA § 240. 8 U.S.C. 1229a. This legislative history is completely consistent with the text of the statute, wherein Congress expressly provided alternate procedures for determining removability when it wished to adopt such procedures.

It is undisputed that the government did not comply with the requirements of INA § 240 in Dr. Samirah's case. 8 U.S.C. § 1229a. Applicable regulations grant Dr. Samirah the right to a hearing, rather than the expedited removal procedures found in INA § 235(b). 8 U.S.C § 1225(b); 8 C.F.R. § 1.1(q) ("an alien who was granted advance parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, shall not be considered an arriving alien for purposes of section 235(b)(1)(A)(i) of the Act"). The government's own policy manuals reflect this understanding:

> If the alien's parole was authorized pursuant to an Advance Authorization for Parole (Form I-512) which was issued while the alien was in the United States in order to allow the alien to return to this country, the expedited removal process does not apply and the alien should be placed in removal proceedings under section

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[6] The Committee Report on § 240 reads:

> Section 240(a) provides that there shall be a single proceeding for deciding whether an alien is inadmissible under section 212(a) or deportable under section 237 (formerly section 241(a)). This subsection shall not affect proceedings under new section 235(c) (aliens inadmissible on national security grounds), new section 238 (currently section 242A) (aliens convicted of aggravated felonies), or new section 235(b)(1) (arriving aliens, or aliens present in the United States without having been admitted or paroled, who are inadmissible for fraud or lack of documents). H.R. Conf. Rep. No. 104-828 104th Cong., 2nd Sess. 1996 (available at 1996 WL 563320 at *211).

240 of the Act as an inadmissible alien, regardless of the grounds of inadmissibility.

INS Field Inspector's Manual, Chapter 16.1 (2002), App. H, *infra*, 39a.[7]

Because there is nothing in INA § 235A, its legislative history or the legislative history of INA § 240 (or any case or administrative interpretation) that overrides the express statement of Congress that removal proceedings before an Immigration Judge constitute "the sole and exclusive procedure for determining whether an alien may be admitted to the United States," the government's interpretation of § 235A must be rejected. *Navarro-Aispura v. INS*, 53 F.3d 233, 235 (9th Cir. 1995) (courts are not obligated to accept an agency's interpretation that is 'demonstrably irrational or clearly contrary to the plain and sensible meaning of the statute."). The Seventh Circuit erred in failing to address these substantive legal arguments below.

C. The Executive does not have the discretionary authority to disobey the statutorily expressed will of Congress, and such actions are not beyond the jurisdiction of the Judiciary.

The Seventh Circuit declined to rule upon the Constitutional or statutory arguments raised by Dr. Samirah, holding instead that the Executive's decision to exclude Dr. Samirah

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[7] The courts have acknowledged that when an alien who has been granted advance parole seeks reentry, he must be given notice and an opportunity to be heard, and his inadmissibility and removability must be decided by an Immigration Judge pursuant to INA § 240: "With a copy of his advance parole document in hand, Balogun traveled to Nigeria and stayed for a period of four weeks. Upon his attempted return on January 23, 1999, Balogun was immediately detained and served with a Notice to Appear. As noted, Balogun's prior drug and larceny charges made him an 'inadmissible' alien. Pursuant to 8 U.S.C. § 1229a [INA § 240], the INS commenced removal proceedings." *Balogun v. INS*, 304 F.3d 1303, 1309 (11th Cir. 2002).

was beyond the jurisdiction of any district court, because it involved the exercise of discretionary power. "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject." *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring). Here, Congress has specified removal procedures which the Executive seeks to bypass.

This case therefore presents a significant test of the Executive's power to disregard a congressionally-mandated statute regarding exclusion. The question presented is whether the Executive possesses sufficient inherent power to contravene a valid immigration statute. An affirmative answer to this question would represent a sharp departure from the logic and spirit of *Knauff* and *Fong Yue Ting*. At a minimum, such a conclusion should be reached on the merits and not by a finding that the courts are disabled from ruling upon the matter.

IV. HABEAS JURISDICTION IS PROPER WHERE AN INDIVIDUAL RETURNING TO HIS DOMICILE IS EXCLUDED IN VIOLATION OF THE LAWS AND CONSTITUTION.

In its opinion, the Seventh Circuit states that the Northern District of Illinois has no jurisdiction over the Attorney General or the Interim Director for Interior Enforcement at the Bureau of Immigration and Customs Enforcement in Chicago because (1) Dr. Samirah was not in "custody" of the United States government; and (2) neither respondent had immediate physical control over Dr. Samirah. On both

issues, the Seventh Circuit has departed from established law of other courts of appeals and admittedly created a circuit split.

A. Dr. Samirah was in custody where his exclusion prevented him from returning to his lawful domicile.

Under the reasoning of the *Samirah* court, once an individual has been expelled from the United States—whether illegally or not—that individual ceases to be in custody. But this means that if the government acts with dispatch, it can prevent any alien from ever challenging the validity of exclusion by preventing the alien from filing a habeas petition while still within the geographic boundaries of the United States. With this power, the government can deport anyone without process and without any possibility of judicial correction. Such a proposition cannot stand.[8]

In this case, it is undisputed that Dr. Samirah was residing in the United States and had applied for permanent residency; he departed the United States holding an advance parole document issued by the government which stated that he was "authorized to depart the United States temporarily for bona fide business or personal reasons and intends to return to the United States to await the adjudication of his/her application for adjustment of status." App. H, *infra*, 30a. The Seventh Circuit held that Dr. Samirah was not in custody upon being excluded, because he could "wander the earth, so long as his wanderings do not lead him to the United States. . . . [which]

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[8] Such a proposition presents a serious Suspension Clause issue. "Even assuming that the Suspension Clause protects only the writ as it existed in 1789," *see INS v. St. Cyr*, 533 U.S. 289, 304 (2001), the Habeas Corpus Act of 1769, 31 Car. II. c. 2., prohibited, among other things, sending an inhabitant or resident of England to "Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions." *Id.* at XII, 2; *see also* 3 William Blackstone, Commentaries *137.

puts him on par with the billions of other non-U.S. citizens around the globe who may not come to the United States." *Samirah v. O'Connell*, 335 F.3d at 549; App. A, *infra*, 7a. But Dr. Samirah is not on par with the billions of people who have never visited the United States. He is a longtime resident of the United States, with a pending application for residency, who traveled outside the United States holding permission from the U.S. government to return. Such a holding ignores decades of this Court's jurisprudence, which holds that an immigrant's process rights are assessed on a sliding scale: "[t]he constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances." *Landon v. Plasencia*, 459 U.S. 21, 34, 103 S. Ct. 321, 330, 74 L.Ed.2d 21 (1982).

The Seventh Circuit's holding conflicts directly with cases from other circuits which have permitted habeas actions where an individual has been wrongly deported and was prevented by the circumstances of the government's actions from filing that action while in the United States. *See, e.g.*, *Subias v. Meese*, 835 F.2d 1288, 1289 (9th Cir. 1987). Based on this Court's holding in *Jones v. Cunningham*, 371 U.S. 236 (1962), the Ninth Circuit has interpreted "custody" broadly to include the restriction of an alien from entering the United States. *Subias*, 835 F.2d at 1289. Indeed, the *Samirah* court readily acknowledged that *Samirah* created a conflict between the circuits. *Samirah v. O'Connell*, 335 F.3d at 550 n.6; App. A, *infra*, 8a.

The control that the United States government now exercises over Dr. Samirah is by definition a restraint on his liberty, and thus Dr. Samirah is in custody for purposes of eligibility to claim habeas relief. The Ninth Circuit adopts this definition, while the Seventh Circuit has not, creating a circuit split which only the United States Supreme Court can resolve.

B. Dr. Samirah has named proper custodians as respondents, and the Seventh Circuit and Northern District of Illinois have personal jurisdiction over both.

A circuit split also exists over the issue of a court's jurisdiction to hear a habeas claim based on the petitioner naming the proper respondent or custodian. "The habeas corpus statute, 28 U.S.C. § 2241(a), permits the writ to be granted by district courts 'within their respective jurisdictions.' The writ . . does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody . . . Read literally, the language of § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian." *Gherebi v. Bush, et. al.*, No. 03-55785, 2003 U.S. App. LEXIS 25625, at *54-55 (9th Cir. Dec. 18, 2003) (citing *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 93 S. Ct. 1123 (1973)). In his petition, Dr. Samirah named Attorney General Ashcroft and Cynthia O'Connell, Interim Director for Interior Enforcement at the Bureau of Immigration and Customs Enforcement in Chicago as respondents.[9] District Court Judge Moran, sitting in Chicago, Illinois, clearly had jurisdiction over Cynthia O'Connell, the Interim District Director in Chicago. The district director had the power to reverse the prior decision of the agency and to permit Dr. Samirah's return to the United States. Dr. Samirah was in custody because he was precluded from returning to his

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[9] Since the institution of this action, the Immigration and Naturalization Service was divided into several constituent parts, and these agencies were moved from the Department of Justice to the Department of Homeland Security. The Secretary of the Department of Homeland Security is now the head of the successor agencies to the INS and would properly be named as a respondent in this matter. However, for purposes of terminological convenience, Dr. Samirah will refer to the Attorney General, who was the Respondent named in the complaint.

home. The lifting of parole revocation would free him from that unlawful restraint and permit his return to the United States. Because that action is within the power of the district director, Dr. Samirah continues to be within her custody for purposes of habeas corpus.

Similarly, the Attorney General was clearly within the jurisdictional reach of the district court, sitting in Illinois, because the Illinois long-arm statute grants such jurisdiction, and the Attorney General, through his agents, had "minimum contacts" with the State of Illinois. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988); *Central States, Southeast and Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 940 (7th Cir. 2000). "A court has personal jurisdiction in a habeas case so long as the custodian can be reached by service of process." *Gherebi v. Bush, et. al.*, No. 03-55785, 2003 U.S. App. LEXIS 25625, at *54-55 (9th Cir. Dec. 18, 2003). Even if the local district director lacked authority over the INS preinspection station located abroad, the Attorney General clearly did have the ability to permit Dr. Samirah's return to the United States. Under these facts, it would have been appropriate for a district court to treat the Attorney General as custodian, even if he did not have day-to-day control of Dr. Samirah. *See, Ex Parte Hayes*, 414 U.S. 1327, 1328-29 (1973).

A number of circuits have recently considered the propriety of naming a cabinet-level officer as respondent in an immigration case. While it is plain that a cabinet-level officer may not ordinarily be named in a habeas petition, the First, Second, Sixth, and Ninth Circuits have each found that the Attorney General may be properly named as a respondent in habeas proceedings under certain circumstances. *See, e.g., Gherebi*, No. 03-55785, 2003 U.S. App. LEXIS 25625, at *54-59 (finding jurisdiction over Secretary of Defense where aliens were detained under his authority outside the country, citing *Strait v. Laird*, 406 U.S. 341, 345 (1972), *Braden v.*

30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 93 S. Ct. 1123 (1973)); *Armentero v. INS*, 340 F.3d 1058, 1064 (9th Cir. 2003) (holding Attorney General proper respondent to immigration habeas petition, stating, ". . . *Braden* necessarily reaffirmed the earlier rulings that the custodian need not be the person with immediate physical control over the detained prisoner while imprisoned...the concept of custodian is a broad one that includes any person empowered to end restraint on a habeas petitioner's liberty, not just the petitioner's on-site, immediate physical custodian."); *Padilla v. Rumsfeld*, No. 03-2235, 2003 U.S. App. LEXIS 25616 *25 (2nd Cir. Dec. 18, 2003) (jurisdiction over Secretary of Defense where U.S. citizen moved from New York to South Carolina; "[w]hen habeas petitions are brought by persons detained for reasons other than federal criminal violations, the Supreme Court has recognized exceptions to the general practice of naming the immediate physical custodian as respondent"); *Vazquez v. Reno*, 233 F.3d 688, 696 (1st Cir. 2000) (Attorney General was "normally" a proper respondent, noting possibility of "extraordinary circumstances"); *Roman v. Ashcroft*, 340 F.3d 314, 324-325 (6th Cir. 2003) (immediate custodian rule generally applies to alien habeas corpus petitioners, but noting that "[i]n light of the degree of control which the Attorney General has over an alien's immediate custodian, we believe that it may be appropriate to recognize the Attorney General as a proper respondent to an alien's habeas corpus petition under certain circumstances.")

None of the courts of appeals—other than the *Samirah* court—have even remotely suggested that an individual who was "in custody" for purposes of habeas would be unable to bring an action anywhere because of the absence of a local custodian. Such an approach would clearly be contrary to *Ex Parte Endo*, 323 U.S. 283 (1944), where the Court held that the district court maintained jurisdiction over the petition for habeas corpus even though the petitioner was discharged from custody. The Supreme Court held that "the court may

act if there is a respondent within reach of its process who has custody of the petitioner," stating that there was no suggestion that there was no one within the jurisdiction who is responsible for the detention of the petitioner. *Ex Parte Endo*, 323 U.S. at 306. The Court held that the appropriate respondent is the person with the ability to release the petitioner from custody, which in this case was not a person within the immediate location of the petitioner. *Id.* at 306-07. This suggests that it is not necessary for the custodian to be within the physical presence of the petitioner in order to be the appropriate respondent.

The Seventh Circuit went out of its way to foreclose any opportunity for Dr. Samirah to seek review of the statutory and constitutional arguments he raised. Failing even to note this Court's longstanding presumption in favor of some review of constitutional questions, the Seventh Circuit held that Dr. Samirah could be excluded from the United States—in violation of the statute and the Constitution—without any review in any court.

While it may be possible for Congress to strip the courts of the power to review certain constitutional questions—this is a question the Court has never answered—where the jurisdiction-stripping statute does not articulate an intent to eliminate constitutional review, and indeed, applies on its face to discretionary decisions only, such an opinion is clearly contrary to this Court's precedent. The decision should be reversed.

V. THE IMPORTANCE OF THIS CASE

A. Importance of this Case for Immigration Law

According to the most recent statistics, approximately 966,000 individuals are awaiting decisions from the government on their applications for permanent residency. U.S. Department of Homeland Security, Yearbook of Immigration Statistics, 2002, U.S. Government Printing Office:

Washington, D.C., 2003, at 6. Tens of thousands of these individuals seek and obtain "Advance Parole" each year so that they may travel outside the United States while their applications are pending. *Id.* at 90. When these aliens return to the United States via preinspection stations—with the permission of the United States government—the government claims for itself the unilateral right to deny them—without review or response—the right to return to this country or to obtain a decision on their application. The government's refusal to permit aliens to return to the United States necessarily results in their pending application being denied, because the applicant will not be present for the applicant interview. 8 C.F.R. § 245.6.

The scope of the government's claims here is breathtaking. The Executive Branch claims the power to exclude (without hearing or appeal) not only individuals applying for permanent residency, such as Dr. Samirah, but individuals who are already permanent residents, or even U.S. citizens (conceding that citizens barred at preinspection stations could seek judicial review). This claim marks a significant expansion of the power claimed by the Executive Branch. Such a claim is clearly contrary to this Court's holding in *Kwong Hai Chew v. Colding*, 344 U.S. 590, 600-01 (1953) (returning permanent resident "entitled to due process without regard to whether or not, for immigration purposes, he is treated as an entrant alien"). It is contrary to the statute, which provides the "sole and exclusive" means by which orders of removal or findings of inadmissibility may be entered. 8 U.S.C. § 1229a(a)(3). For the courts not only to countenance such a significant change, but to find themselves entirely without jurisdiction even to consider statutory or constitutional questions, is a matter of great import and would be enough to merit this Court's attention in its own right.

B. Relation of this Case to Al-Odah and Rasul, Currently on this Court's Docket.

The Court recently granted certiorari to resolve difficult jurisdictional issues relating to non-citizens detained at the U.S. Naval Base in Guantanamo Bay, Cuba. *See Al Odah v. United States*, 124 S. Ct. 534, 535 (November 10, 2003) (No. 03-343); consolidated with *Rasul v. Bush*, 124 S. Ct. 534 (2003). These two consolidated cases may directly impact on this case, as they present jurisdictional issues strikingly similar to those presented herein.

The consolidated cases of *Rasul* and *Al-Odah* present both parts of the jurisdictional arguments raised in the complaint in this case. *Rasul* was brought as a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241; *Al-Odah* was brought under several other jurisdictional statutes, including 28 U.S.C. § 1331 in conjunction with the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.*, and 28 U.S.C. § 1361 Mandamus. The jurisdictional bases urged in this case include habeas corpus under 28 U.S.C. § 2241, federal question jurisdiction under 28 U.S.C. § 1331, in conjunction with the Administrative Procedures Act, 5 U.S.C. §§ 701 *et seq*, and Mandamus under 28 U.S.C. § 1361.

There are, however, important distinctions as well. As the government has observed in its brief to the court in *Al-Odah*, "the Guantanamo detainees, just like the prisoners in *Eisentrager*, are aliens with no connection to the United States." Brief for Respondents in Opposition, *Rasul v. Bush*, *Al-Odah v. United States*, No. 03-334, 03-343, at 12. In *Eistentrager*, the Petitioners (like the Petitioners/Plaintiffs in *Rasul/Al-Odah*) "at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950).

Dr. Samirah, by contrast, very clearly was within this country at a "relevant time." Unlike the detainees in *Al-Odah* and *Rasul*, Dr. Samirah was domiciled in the United States at the time he filed his Complaint and Petition. Although he was physically outside the boundaries of the United States at the time of the filing of this action, due to the government's improper actions, he had not abandoned his domicile within U.S. borders. Because Dr. Samirah had a long, lawful residence within the United States and a pending application for permanent residency, he had due process rights relating to his exclusion from the country.

It may be that the Court's resolution of the jurisdictional matters raised by *Al-Odah* and *Rasul* will be dispositive of jurisdictional issues raised in this case, and will support remand to the Court of Appeals for reconsideration in light of that decision. In the universe of cases brought by detained aliens, *Al Odah/Rasul* lies beyond *Samirah*, further from the core of cases for which jurisdiction clearly exists. A finding that jurisdiction exists in *Al-Odah/Rasul* would likely compel the same result in *Samirah*, and result in remand.

This case, however, involves grave constitutional questions not present in *Al-Odah*, given that Dr. Samirah was domiciled within the country and residing in Illinois with his wife and children at the time of his exclusion. Regardless of the answer given by the Court to the jurisdictional questions raised in *Al-Odah* and *Rasul*, this case would constitute an appropriate vehicle for resolving the several conflicts that have arisen in the courts of appeals relating to the situation of non-citizens wrongfully deported or excluded from the United States.

CONCLUSION

For the foregoing reasons, Dr. Sabri Samirah respectfully requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-1786

SABRI I. SAMIRAH,
Plaintiff-Appellee,
v.

CYNTHIA J. O'CONNELL, INTERIM DISTRICT DIRECTOR FOR INTERIOR ENFORCEMENT, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT,
Defendant-Appellant.

No. 03 C 1298
Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
James B. Moran, *Judge.*

ARGUED JUNE 5, 2003—DECIDED JULY 2, 2003

Before FLAUM, *Chief Judge*, and COFFEY and MANION, *Circuit Judges.*

MANION, *Circuit Judge.* After the government revoked the advance parole of Sabri Samirah, an alien, the district court ordered advance parole to be reinstated. Because that order exceeded the district court's jurisdiction, we reverse.

I.

Sabri Samirah is a Jordanian citizen who first entered the United States in September 1987 on a student visa. According to the government, however, Samirah did not comply with the terms of his visa. At some point he dropped out of

school and out of lawful immigration status for more than two years. Years of legal battles between Samirah and the government ensued. We examine that long legal history only insofar as it is relevant to the narrow issue before us.

In 2002, Samirah, who was still classified as an alien, filed a request for advance parole, stating that he intended to travel abroad for approximately two weeks in May 2003. (Advance parole, as we shall explain in detail later, is basically permission for a resident alien to reenter the United States after departing for some stated purpose.) The Immigration and Naturalization Service (INS)[1] approved this application, pursuant to 8 U.S.C. § 1182(d)(5), in December 2002. Samirah then departed the United States on December 28, 2002, which was about four months earlier than he had represented to the INS. On January 17, 2003, while Samirah was abroad, the District Director of the Chicago INS Office, acting on behalf of the Attorney General, revoked his advance parole because the INS had received information that he was a "security risk to the United States." On January 18, 2003, the INS served this revocation on Samirah at its pre-inspection station in Shannon International Airport, Ireland. It also concluded that, because Samirah had more than one year of unlawful presence in the United States and lacked a valid travel document, he was inadmissible under 8 U.S.C. § 1182(a)(7)(A)(i). With no advance parole and no documents (e.g., a visa) that would allow his entry into the United States, Samirah returned to Jordan. Although it is not clear from the record where Samirah resides at the moment, one thing is certain: he is not in the United States. This is particularly

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[1] On March 1, 2003, the INS ceased to exist as an independent agency within the United States Department of Justice, and its functions were transferred to the newly-formed Department of Homeland Security. *See* 79 Interpreter Releases 1777, 1777 (2002). The transition is irrelevant for our purposes and, for ease of use, we shall refer to the INS throughout this opinion.

disturbing to Samirah because his children are all citizens of the United States who reside in this country, and his wife is a non-citizen who also resides here.

On February 20, 2003, Samirah's attorney filed an action in the district court seeking, among other things, injunctive relief requiring the government to allow his return to the United States. He asserted jurisdiction under Article I, § 9 of the Constitution and various federal statutes, including 28 U.S.C. § 2241, which provides to federal courts the general power to grant the writ of habeas corpus. The district court issued an injunction requiring the government to allow Samirah's return, reasoning that "the only thing we conclude is that the government cannot short-circuit the rights of an alien who has long lived in the United States by revoking his parole and then treating him as if he had never been here at all." The government appeals, asserting, among other arguments, that the district court lacked jurisdiction.

II.

To understand this case, we first need to examine the function that parole plays in our system of immigration law. The Attorney General[2] has the discretion to "parole" aliens into the United States. 8 U.S.C. § 1182(d)(5)(A) (2000). Parole allows an alien temporarily to remain in the United

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[2] During the period when Samirah's advance parole was revoked, the Attorney General had delegated his parole authority to his INS district directors. *See* 8 C.F.R § 212.5 (2002). In this case, as discussed above, the actual decision to revoke parole was made by the District Director of the Chicago INS Office, Brian R. Perryman. We nonetheless refer to the "Attorney General" as exercising this discretionary authority because, as far as the law is concerned, district directors act as the Attorney General's surrogate when exercising the discretionary authority that he has delegated to them. *See Parra v. Perryman*, 172 F.3d 954, 957-58 (7th Cir. 1999) (discussing the "Attorney General's" discretionary decision to detain an alien pending removal, even though District Director Perryman was the named respondent).

States pending a decision on his application for admission. *Id.* § 1182(d)(5). Although a paroled alien has "liberty to roam the country," the law considers him legally detained at the border within the government's custody until his immigration status is determined. *Chavez-Rivas v. Olsen*, 207 F. Supp. 2d 326, 328 (D.N.J. 2002). In some cases (this is one of them), the Attorney General grants advance parole to an alien who is already in the United States but who also wants the assurance that he will be allowed to leave and return. *Assa'ad v. United States Atty. Gen.*, ___ F.3d ___, 2003 WL 21282457, at *3 (11th Cir. June 5, 2003); 5 Charles Gordon, et al., Immigration Law and Procedure § 62.02[2], at 62-13 (Rev. ed. 2003). The Attorney General also has the discretion to revoke advance parole after it has been granted. 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 212.5(e)(2)(i). After determining that Samirah was a security risk, the Attorney General exercised that discretion and revoked his advance parole.

The district court, however, reversed the decision to revoke parole and candidly determined that a parole revocation could not have the legal effect of destroying whatever rights Samirah had to contest removal. The district court thought it a "judicial responsibility" to require the executive branch to adhere to its obligations. It thus concluded that "the government cannot short-circuit the rights of an alien who has long lived in the United States *by revoking his parole* and then treating him as if he had never been here at all," (emphasis added) and it then ordered the government to allow Samirah's return.

We must determine whether federal courts have subject matter jurisdiction to review discretionary decisions of the Attorney General, such as the decision to revoke parole. We review *de novo* the existence of subject matter jurisdiction. *Iddir v. INS*, 301 F.3d 492, 496 (7th Cir. 2002). First, we examine Congress's jurisdictional grant in the non-habeas context. The government cites 8 U.S.C. § 1252(a)(2)(B)(ii)

for the proposition that Congress has divested federal courts of such jurisdiction. Section 1252(a)(2)(B)(ii) provides as follows:

> (B) Denials of discretionary relief
>
> Notwithstanding any other provision of law, no court shall have jurisdiction to review— . . .
>
> (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.

The authority for the Attorney General to grant and revoke parole stems from § 1182(d)(5),[3] a provision that is "specified under" the "subchapter" mentioned in § 1252(a)(2)(B)(ii). (Subchapter II of Chapter 12 of Title 8, includes §§ 1151-1378.) The exercise of that authority is, as we mentioned earlier, a matter of the Attorney General's discretion. Hence, argues the government, the plain language of § 1252(a)(2)(B)(ii) precludes jurisdiction. Samirah, apparently relying on the fact that § 1252 is titled "Judicial review of orders of removal," argues that the provision is inapplicable because "there is neither a removal order nor [are there] removal proceedings in this case." Some district courts have taken this position, holding that § 1252(a)(2)(B)(ii) is limited to discretionary decisions made within the context of removal proceedings. *See, e.g., Talwar v. INS*, 94 F. Supp. 2d 1120, 1124 (D. Or. 2000); *Shanti v. Reno*, 36 F. Supp. 2d 1151, 1159 (D. Minn. 1999).

We, however, disagree. "[T]he heading of a section cannot limit the plain meaning of the text." *Brotherhood of Railroad*

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[3] 8 U.S.C. § 1226 also allows the Attorney General to grant or revoke parole in cases in which an alien has been detained, but that is irrelevant to this case because the INS expressly relied on § 1182(d)(5) and because it did not detain Samirah.

Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519, 528-29 (1947). The plain meaning of § 1252(a)(2)(B)(ii)'s text is that "no court shall have jurisdiction to review" any decision of the Attorney General to deny discretionary relief "specified under this subchapter." We therefore join two of our sister circuits and a number of district courts in holding that § "1252(a)(2)(B)(ii) is not limited to discretionary decisions made within the context of removal proceedings." *CDI Information Servs. Inc. v. Reno*, 278 F.3d 616, 620 (6th Cir. 2002); *accord Van Dinh v. Reno*, 197 F.3d 427, 434 (10th Cir. 1999); *El-Khader v. Perryman*, No. 02 C 984, 2003 WL 1790862, at *3 (N.D. Ill. Apr. 2, 2003); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 11 (D. D.C. 2001); *Avramenkov v. INS*, 99 F. Supp. 2d 210, 214 (D. Conn. 2000). Because the Attorney General's decision to grant or revoke parole is squarely within the ambit of § 1252(a)(2)(B)(ii), we hold that the district court lacked jurisdiction to review, much less reverse, the revocation of Samirah's parole—at least outside the context of a habeas proceeding.

Samirah alleges habeas jurisdiction under 28 U.S.C. § 2241, and contends that § 1252(a)(2)(B)(ii) does not preclude a court from granting the writ. There is authority for the proposition that, pursuant to *INS v. St. Cyr*, 533 U.S. 289 (2001), § 1252(a)(2)(B)(ii) should not be construed as stripping federal courts of habeas jurisdiction over challenges to the INS's parole determinations. *See Sierra v. INS*, 258 F.3d 1213, 1217 (10th Cir. 2001); *Jeanty v. Bulger*, 204 F. Supp. 2d 1366, 1374 (S.D. Fla. 2002). *But see Curri v. Reno*, 86 F. Supp. 2d 413, 421 (D. N.J. 2000) (holding, without the benefit of the Supreme Court's opinion in *St. Cyr*, that § 1252(a)(2)(B)(ii) repeals habeas jurisdiction). Nevertheless, § 1252(a)(2)(B)(ii)'s effect on habeas jurisdiction is an issue that we need not address today. The district court lacked jurisdiction under § 2241 for at least two reasons, neither of which involves § 1252(a)(2)(B)(ii). The first reason is that Samirah was not in custody when he filed this case. The

second is that, even if he could somehow be considered to have been in custody, the district court would still have lacked jurisdiction over his custodian.

Federal courts have jurisdiction to issue writs of habeas corpus under § 2241 only where the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c); *Williams v. Chrans*, 894 F.2d 928, 937 (7th Cir. 1990). Although the word "custody" is elastic, all definitions of it incorporate some concept of ongoing control, restraint, or responsibility by the custodian. *See* Black's Law Dictionary 384 (6th ed. 1990). In the context of *Miranda* warnings, for example, a suspect is in custody only if a reasonable person in his position would not believe that he was free to leave. *United States v. Salyers*, 160 F.3d 1152, 1159 (7th Cir. 1998). Samirah's problem is not that he lacks freedom to *leave*; Samirah's problem is that, by dint of the government's revocation of his parole and his lack of the proper documents, he is not free to *return*. But the United States is exercising no ongoing control, restraint or responsibility over him. As far as the government is concerned, Samirah may wander the earth, so long as his wanderings do not lead him to the United States. Samirah is, in some sense, restrained insofar as he cannot enter the United States. But that restraint, such as it is, only puts him on par with the billions of other non-U.S. citizens around the globe who may not come to the United States without the proper documentation.[4] Nevertheless, Samirah does point to one authority that

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[4] We recognize that Samirah, like many aliens seeking entry to this country, has family in the United States. Although we are sympathetic as to why that raises the stakes for him, we know of no authority for the idea that having family in the United States changes the analysis of custody. We also note, moreover, that he finds himself in that position because he lived here for many years, often with dubious authority. During that time he made what was, at best, a series of half-hearted attempts to improve his immigration status.

could be read as construing § 2241 jurisdiction to encompass such people.

Samirah quotes *Jones v. Cunningham*, 371 U.S. 236 (1962), to the effect that the Supreme Court "has repeatedly held that habeas corpus is available to an alien seeking entry into the United States, although in those cases each alien was free to go anywhere else in the world." *Id.* at 239. Taking that statement out of context, it would be reasonable to infer that all aliens seeking entry into the United States, regardless of their otherwise unfettered mobility *outside* of this country, are in United States custody. The Ninth Circuit, albeit with little analysis, has interpreted *Jones* as standing for the proposition that, by itself, "denial of entry amounts to a restraint on liberty" sufficient to constitute custody for purposes of § 2241. *See Subias v. Meese*, 835 F.2d 1288, 1289 (9th Cir. 1987).[5]

We disagree with the Ninth Circuit's construction of *Jones* because, when interpreted as a whole, *Jones* does not support such a broad conclusion.[6] The *Jones* Court qualified the sweeping statement that Samirah quotes by noting that "custody" requires at least some restraint that is "not shared by the public generally" and that such restraints had "been thought sufficient in the English-speaking world to support the issuance of habeas corpus." *Jones*, 371 U.S. at 240. Thus,

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[5] *Subias* involved a fugitive from United States prosecution who claimed to be "in custody" in his native Mexico and, because he was denied entry to the United States, also claimed that he was entitled to habeas relief. Based on *Jones*, the Ninth Circuit acknowledged that custody is broadly construed to include restriction from entry into the United States, but denied habeas relief on the ground that there was no jurisdiction over any custodian.

[6] Because this opinion creates a split between circuits, we circulated it in advance of publication to the judges of the court in regular active service, pursuant to Seventh Circuit Rule 40(e). None voted to hear the case en banc.

a proper reading of *Jones* leads to the conclusion that an alien abroad who seeks entry into the United States must, at the very least,[7] suffer some unique restraint that would, in light of historical precedent, constitute custody for the purposes of habeas jurisdiction. *See id.*

Samirah does not clear that hurdle. Neither of the two cases he cites is precedent for a court to exercise habeas jurisdiction over an undocumented alien merely because that alien was refused entry into the United States. In *Arias v. Rogers*, 676 F.2d 1139, 1142 (7th Cir. 1982), we held that an alien released on bond pending deportation proceedings was in custody, and in *Flores v. INS*, 524 F.2d 627, 629 (9th Cir. 1975), the Ninth Circuit held that an alien released on his own recognizance during a departure period was likewise in custody. There is, of course, substantial authority for the idea that a person released on bond, or on his own recognizance, is "in custody" for purposes of habeas jurisdiction. 26 A.L.R. 4th 455, § 3(a) (1983). But Samirah is not released on bond, or his own recognizance, and so his case is easily distinguished from both *Arias* and *Flores*.

We further note that Jones himself was a United States citizen, and that not one of the four cases the *Jones* Court cited for the proposition that it had "repeatedly held that habeas corpus is available to an alien seeking entry into the

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[7] Although we need not address the issue today, we note that it is not clear that federal courts may exercise extraterritorial jurisdiction over an alien bringing a habeas petition. *Compare Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950) (observing that "in extending constitutional protections beyond the citizenry the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary the power to act"), *and Gherebi v. Bush*, ___ F. Supp. 2d ___, 2003 WL 21180433 (C.D. Cal. 2003) (holding that a district court lacks habeas jurisdiction over aliens detained outside U.S. territory), *with Ahmed v. Department of Homeland Sec.*, 328 F.3d 383, 385-87 (7th Cir. 2003) (holding that the district court had jurisdiction over the petition for the writ of mandamus of an alien abroad).

United States, although in those cases each alien was free to go anywhere else in the world" proves analogous to Samirah's situation or supports the proposition that there may be habeas jurisdiction over an alien abroad merely because he was refused entry. *See Jones*, 371 U.S. at 239 (citing *Brownnell v. Shung*, 352 U.S. 180, 183 (1956); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *United States v. Jung Ah Lung*, 124 U.S. 621, 626 (1888)). In *Brownell*, the alien brought a declaratory action under the Administrative Procedure Act in order to challenge an order of deportation; he did not bring a habeas action. *Brownell*, 352 U.S. at 182-86. In *Mezei*, the alien was detained by the government, and effectively imprisoned on Ellis Island, because the United States had permanently excluded him on security grounds and no other country was willing to accept him. *Mezei*, 345 U.S. at 207. In *Knauff*, a case in which the Court did not discuss jurisdiction, the alien was likewise "detained at Ellis Island." *Id.* at 539. In *Jung Ah Lung*, the alien was detained by the master of a steamship under color of federal law (the Chinese Restriction Act), and was therefore considered to be in federal custody for purposes of habeas jurisdiction. *Jung Ah Lung*, 124 U.S. at 626. None of these cases even remotely supports the idea that an alien abroad who is denied entry is, for that reason alone, in United States custody.

Samirah is a Jordanian citizen (apparently) living in Jordan. He is also a person over whom the United States exercises no control or responsibility, and who (as far as the government is concerned) is free to travel the world. Nevertheless, Samirah contends that he is in federal custody. We disagree with Samirah's argument be cause (1) it stretches the word "custody" beyond what the English language or logic will bear, and (2) legal authorities do not support it. We therefore hold that the district court lacked jurisdiction over Samirah's § 2241 petition.

There is an also an alternate ground for our holding that the district court lacked § 2241 jurisdiction. If Samirah is to proceed under § 2241, he must name his custodian as respondent and file the petition in a district court that has jurisdiction over his custodian; otherwise, the district court would lack jurisdiction. *Montenegro v. United States*, 248 F.3d 585, 594 (7th Cir. 2001), *overruled on other grounds by Ashley v. United States*, 266 F.3d 671, 674-75 (7th Cir. 2001). The custodian, in most cases, "is the person having a day-to-day control" over the petitioner, because he "is the only one who can produce 'the body' of the petitioner." *Guerra v. Meese*, 786 F.2d 414, 416 (D.C. Cir. 1986) (holding that the Parole Commission was not the custodian despite its power to release the petitioner). Samirah has named Cynthia J. O'Connell, Interim Director for Interior Enforcement at the Bureau of Immigration and Customs Enforcement, as the respondent. Yet it is clear that neither she, nor any other governmental official, has "day-to-day" control over, or can produce, Samirah. Samirah is free, we emphasize once again, to travel the world at his leisure. Because O'Connell lacked control over Samirah at the time his § 2241 action was filed, she was not his custodian.

We note that there may be limited circumstances in which the United States holds a prisoner abroad (and there is thus no domestic forum where the custodian is present) in which a petitioner may be allowed to file a habeas action in a district where *someone* with control over his body is located. For example, in *Ex Parte Hayes*, 414 U.S. 1327 (1973), a soldier on active duty in Germany filed a petition for a writ of habeas corpus directly with Justice Douglas. *Id.* at 1328-29. Justice Douglas reasoned that, although the serviceman's immediate commanding officer was outside the territorial limits of any district court, others in his chain of command were not. *Id.* The Secretary of the Army, for example, was located within the jurisdiction of the District Court for the District of Columbia. Justice Douglas therefore transferred the case to

that court. *Id.* In the unusual circumstances of that case, an extraterritorially-detained petitioner had access to the writ in the District of Columba.

Even in *Hayes*, however, the "custodian" located in the District of Columbia could physically produce the body to the district court. That is not so in this case. Here, neither the named respondent, nor anyone else in the federal government (much less someone physically present in the Northern District of Illinois), could produce the body. We hold that no custodian was within the district court's territorial limits when this case was filed, and that court therefore lacked habeas jurisdiction. *See Subias*, 835 F.2d at 1289 (holding that jurisdiction did not exist because the petitioner's location abroad and custodian were unknown and, therefore, no governmental official could produce the body).

III.

The district court lacked jurisdiction over Samirah's § 2241 petition because he was not in custody and because it lacked jurisdiction over his putative custodian. Section 1252(a)(2)(B)(ii) bars jurisdiction over of the rest of Samirah's action. The latter holding once again drives home the point that federal courts are courts of finite jurisdiction, jurisdiction that Congress delineates. *See Aldinger v. Howard*, 427 U.S. 1, 15 (1976). Section 1252(a)(2)(B)(ii) makes clear that one of the subjects beyond any statutory grant of jurisdiction, at least outside the context of a habeas proceeding, is review of the Attorney General's discretionary decision to revoke parole. Because the district court lacked the jurisdiction to reinstate Samirah's advance parole, we reverse.

REVERSED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

[Filed Mar. 27, 2003]

No. 03-1789

SABRI I. SAMIRAH,
Plaintiff-Appellees,

v.

CYNTHIA J. O'CONNELL, INTERIM DISTRICT DIRECTOR FOR INTERIOR ENFORCEMENT, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT,
Defendant-Appellant.

No. 03 C 1298
Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
James B. Moran, *Judge*.

The following are before the court:

1. MOTION TO FILE BRIEF IN EXCESS OF TWENTY PAGES, files on March 26, 2003, by counsel for the appellant.
2. RESPONDENT-APPELLANTS EMERGENCY MOTION FOR STAY PENDING APPEAL, submitted on March 26, 2003, by counsel for the appellant.
3. RESPONDENT'S MOTION IN OPPOSITION TO STAY OF ENFORCEMENT OF JUDGE MORAN'S ORDER, filed on March 26, 2003, by counsel for the appellee.

IT IS ORDERED that the motion for leave to file a brief in excess of twenty pages is GRANTED. The clerk of this court shall file INSTANTER the tendered copies of the motion for stay pending appeal.

IT IS FURTHER ORDERED that the motion for stay pending appeal is GRANTED. The order of the district court dated March 25, 2003, is stayed pending appeal. In the motion, the government has represented to the court that a stay will cause only moderate delay. The government provides "[m]oreover, where, as here, the matter involves national security, staying the district court's order so that the alien need experience only a moderate delay during which time, the appellate court can resolve the important issues presented in this case, is warranted." See Appellant's Emergency Motion for Stay at p. 23, citing Dellinger v. Mitchell, 442 F.2d 782, 786 (D.C. Cir. 1971). We construe this language as a government waiver of the 90-day period of 8 U.S.C. § 1229b(d)(2). The appellee's only complaint is that he may suffer legal detriment if a stay is granted. But if on appeal it is determined that the appellee was improperly excluded, he will be free to pursue any legal argument that would have been originally available to him. Accordingly,

IT IS THEREFORE ORDERED that the 90-day period of 8 U.S.C. § 1229b(d)(2) is hereby equitably tolled. If an appeal it is determined that the appellee has been improperly excluded, this exclusion will not affect his pending application for adjustments of status.

IT IS FINALLY ORDERED that briefing in this appeal is EXPEDITED and will proceed as follows:

1. The brief and required short appendix of the appellant is due no later than April 16, 2003.

2. The brief of the appellee is due no later than May 7, 2003.

3. The reply brief of the appellant, if any, is due no later than May 19, 2003.

The parties are advised that the briefs must be received in the clerk's office by the specified dates.

Oral argument in this matter will be heard during the week of June 2, 2003, and will be set by separate court order.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 03-1786

SABRI I. SAMIRAH,
Plaintiff-Appellee,

v.

CYNTHIA J. O'CONNELL, INTERIM DISTRICT DIRECTOR FOR INTERIOR ENFORCEMENT, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT,
Defendant-Appellant.

No. 03 C 1298
Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
James B. Moran, *Judge*

October 30, 2003

ORDER

Before Hon. Joel M. Flaum, *Chief Judge,* Hon. John L. Coffey, *Circuit Judge*, Hon. Daniel A. Manion, *Circuit Judge.*

On consideration of the petition for rehearing en banc filed by plaintiff-appellee, no judge in active service has requested a vote on the petition for rehearing en banc, and all of the judges on the original panel have voted to deny rehearing. The petition is therefore DENIED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 03 C 1298

SABRI IBRAHIM SAMIRAH,
Plaintiff,

vs.

JOHN ASHCROFT, Attorney General of the United States;
BRIAN PERRYMAN, as Chicago District Director,
Immigration and Naturalization Service;
IMMIGRATION AND NATURALIZATION SERVICE;
UNITED STATES DEPARTMENT OF JUSTICE,
Defendants.

ORDER

THIS MATTER COMING before the court on plaintiff's motion for preliminary injunction, counsel for both parties having been present and heard, and the court being fully advised on the premises,

IT IS HEREBY ORDERED THAT:

1. Plaintiff's motion for preliminary injunction is granted.

2. Defendants must issue, or arrange for the issuance of, any and all documents necessary to permit Sabri Samirah to enter the United States on or before March 28, 2003.

/s/ James B. Morgan
JAMES B. MORGAN
Senior Judge, U.S. District Court

March 25, 2003

APPENDIX E

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NORTHERN DISTRICT OF ILLINOIS
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No. 03 C 1298

SABRI IBRAHIM SAMIRAH,
Plaintiff,

vs.

JOHN ASHCROFT, Attorney General of the United States;
BRIAN PERRYMAN, as Chicago District Director,
Immigration and Naturalization Service;
United States Department of Justice,
Defendants.

TRANSCRIPT OF PROCEEDINGS -

BEFORE THE HONORABLE JAMES B. MORAN

APPEARANCES:

For the Plaintiff: MR. MARK A. FLESSNER
MS. MELISSA M. BIEN
MR. CHARLES ROTH

For the Defendants: MR. CRAIG A. OSWALD
MS. SHEILA ENTENMAN
MR. DOUGLAS GINSBURG

K. JOSEPH SNYDER
Official Reporter
219 S. Dearborn Street, Room 1854-B
Chicago, Illinois 60604
(312) 939-2059

K. JOSEPH SNYDER, Official Reporter
(312) 939-2059

[2] THE CLERK: 2003 C 1298, Samirah versus Ashcroft, et al.

MR. FLESSNER: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. FLESSNER: Mark Flessner, Melissa Bien and Chuck Roth on behalf of the plaintiff, Dr. Sabri Samirah.

MR. OSWALD: Good afternoon, Your Honor.

Craig Oswald, Sheila Entenman from the U.S. Attorney's office on behalf of the United States, and this is Douglas Ginsburg from the office of immigration and litigation for the Department of Justice in Washington.

THE COURT: Well, given time constraints, this is not exactly a Law Review piece, but I will give it my best shot.

Petitioner is a citizen of Jordan. He has lived in the United States for 15 years. His wife has applied for adjustment of status to become a legal permanent resident. He has three children, all born here and therefore citizens of the United States. He has received graduate degrees here and was employed here prior to his departure to Jordan. He has applied for adjustment of status to legal permanent resident, derivative of his wife's status.

Some months ago petitioner wished to visit his ill mother in Jordan. He applied for and received an advance parole on December 4, 2002. That advance parole was necessary for the continuation of his application for adjustment of [3] status which would otherwise be deemed abandoned if he left the country. Petitioner left later that month.

On January 17, 2003, his parole was revoked ostensibly because he was a security risk. At this juncture we have not been provided with any information that supports the notion that the government granted the advance parole and then revoke it for the purpose of having him leave the country and not be able to return.

Returning to the United States on January 18, 2003, petitioner was routed through Shannon, Ireland. Shannon is a preinspection station: that is, the status of aliens is reviewed there, and those deemed inadmissible are not permitted to continue on to the United States. Petitioner was deemed inadmissible and was not allowed to continue.

If he had left on a flight to the United States from airport not designated as a preinspection station, his admissibility would have been determined upon arrival in this country.

I think it would be useful to begin by stating what is clearly not in dispute and what this case is not about. It is clearly undisputed that an alien seeking to come to the United States for the first time has virtually no rights. He or she can be excluded at a preinvestigation station abroad and has no right to return to either the Article II immigration courts or the Article III courts.

[4] This Court has no jurisdiction to question the discretionary act of granting or not granting an advance parole. The petitioner concedes that this Court has no jurisdiction to overturn the discretionary act of revoking the parole. That concession is possibly a little broad in view of Balogun versus United States Attorney General, 304 F.3d 1303, Eleventh Circuit, 2002, where our Judge Cudahy recognized that a person returning has to demonstrate that he was admissible, and the petitioner there could not because he statutorily was inadmissible because of two prior felony convictions. He did there suggest that advance parole was guaranteed if the petitioner was prima facie-eligible for an adjustment of status. But that is not relevant one way or the other to the determination here.

Further, this Court does not have the right to second-guess a determination that someone is a security risk. Finally, this Court has no authority to grant an adjustment of status.

But none of these matters, so far as I am concerned, is dispositive of the claims for relief here. Petitioner wishes to be permitted to return and return expeditiously so as not to have to face a contention that he has abandoned his application for adjustment of status by being out of the country too long. He claims he has not been legally removed because the appropriate procedures were not followed.

[5] The government claims that the removal procedures for illegal aliens who make it here do not apply because there is no need for any removal process if the alien was prohibited from coming into the United States at a reinspection station, here, Shannon Ireland. According to the government, the petitioner is in the position of being an alien seeking to come to the United States and being foreclosed from that admission prior to ever reaching a port of entry.

We note in passing that there is something somewhat anomalous about rights depending upon the vagaries of flight itineraries since presumably if the petitioner had had a direct flight not through a reinspection station airport, he would have arrived in the United States and been accorded the removal procedures required by the statutes.

We note as well that what happened here has a kind of "gotcha" quality that I personally feel is somewhat demeaning to this country. The government in effect is saying that it made a mistake in granting parole and that, subsequently realizing it had made a mistake, it should be able to use that mistake to its advantage to eliminate rights that the petitioner otherwise would have. But neither of those observations leads to a decision here.

The petitioner, a citizen of Jordan, was a resident of this country for 15 years. His spouse is an applicant for legal permanent residency. They have three children, all of [6] them citizens. The petitioner has either been going to school here or been employed here during that period, and his home

is in the Chicago area. Can, in these circumstances, a parole revocation have the legal effect of destroying what rights petitioner has had to contest the removal and of ending the government's obligation to follow the statutory procedures in affecting a removal? We think not.

Landon versus Plasencia, 459 U.S. 21, 1982, among others, recognizes that an alien admitted to this country has developed over time a gradually ascending collection of rights. The government recognizes that to be so, but contends those rights are accorded only to aliens who have reached the status of permanent resident alien. We do not agree. The opinions do not make that distinction and, indeed, the concept of a gradually ascending continuum of rights is inconsistent with the notion of a particular legal status. The Supreme Court in Landon refers to continuously present resident alien which the petitioner certainly was prior to his brief trip to Jordan. That concept was earlier recognized in Johnson versus Eisenstrager, 339 U.S. 763, 1950, upon which the government heavily relies, where the Court recognized a continuum of ascending rights as an alien increased his identity with our society. We do not think that the government's refusal to permit the petitioner to return squares with that concept.

The government directs us to cases such as Shaughnessy [7] versus United States, 325 U.S. 206, 1953, where an alien has been legally prevented from reentering the United States following a lengthy departure. The Supreme Court determined in Shaughnessy that an alien who left for 19 months without any type of permission from the government could legally be kept out of the-country without due process. If there is a "clean break" in the alien's continuous residency in the country, any constitutional protections acquired during the stay in the United States are effectively waived.

Here there is no such indication of waiver. Petitioner left the United States for a short period of time to visit his ill

mother in Jordan and did so only after his application for advance parole was granted. The legal significance of the advance parole is not as important as the fact that petitioner clearly demonstrated his intent to return to this country.

While petitioner may be entitled to something less than a full pre-deprivation hearing, he has certainly moved up the consequence continuum of constitutional protection. Whether the government claims to be excluding or removing the petitioner is not important. In either case, the constitution protects the rights acquired during petitioner's time in the United States.

In view of-those rights, we do not believe that the government can lawfully refuse to permit the petitioner to [8] return unless it has been determined that he is not lawfully admissible. Courts may not interfere with the discretionary functions of the Attorney General, but it is certainly a judicial responsibility to require the Executive branch to adhere to its statutory obligations. 8 USC section 1229a prescribes that an immigration judge shall conduct proceedings for deciding the admissibility or deportability of an alien. That has not happened.

Of course, this Court cannot and should not direct the government to initiate removal proceedings, but if it, the government, wishes to remove petitioner, that is the route that it must follow. If such a proceeding is initiated, then the immigration judge, an Article II judge in the Executive department, may have to determine some of the issues alluded to in the rather, I would say, very voluminous briefs here, such as whether the petitioner was not wholly accurate in some of his filings and what the legal effect of that might be. Again, this Court does not have jurisdiction to hear that matter initially or at any time thereafter.

In the meantime, the only thing we conclude is that the government cannot short-circuit the rights of an alien who has

long lived in the United States by revoking his parole and then treating him as if he had never been here at all.

This result is the same regardless of whether we construe petitioner's claim as a habeas petition, a prayer for [9] relief under the APA or a mandamus action. While Landon allowed an alien outside the United States to file a habeas petition seeking constitutional due process, the APA would likewise not allow the government to deprive petitioner of a protected right without the statutorily required process. A removal hearing as created by the INA would satisfy these requirements, but a simple preinspection proceeding would not.

Finally, if all other avenues were closed off to the petitioner, he would be permitted to seek mandamus relief. In any case, once petitioner has begun to climb up the continuum of constitutional rights, these rights may not be deprived without due process.

Accordingly, we enjoin the government from denying petitioner's return to Chicago as a port of entry on the ground that he has not been lawfully removed. What the government may thereafter initiate is not before the Court.

MR. FLESSNER: Your Honor, being the eternal optimist, we took the liberty of drafting an order. I am going to hand a copy of it to Mr. Oswald for his review and hand it to Mr. Haynes to let you take a look at it.

Given the time frame, as you know, it is eight hours ahead in Amman right now. We would respectfully request that the information be transferred to the U.S. Embassy in Amman immediately, such that, he has reserved a flight, and such that he can get his travel documents tomorrow which would be [10] Wednesday in Amman and get on a plane immediately to return to the United States.

THE COURT: Well, the order just carries out what I have just provided. So I will sign it. I then will give you a signed copy, and you can—

MR. OSWALD: Your Honor, we would move for a stay pending—

THE COURT: and I won't stay it.

MR. OSWALD: Okay, that's fine, Your Honor, but I am not sure exactly—I understand what Your Honor's order is, and if this is what Your Honor wants us to carry out, but I am not sure that any of this is specifically responsive to—I am not sure that the United States Embassy in Amman, Jordan, is the place where we would go to effectuate this. I mean, we can discuss this with Mr. Flessner. I am not sure exactly that this is the way that this would be carried out.

MR. FLESSNER: If he were obtaining a visa, he would go to the embassy in Amman. We took the liberty of getting on the Internet to make sure the embassy is open and has resumed operations on Sunday.

THE COURT: Well, why don't we just put in paragraph three, "Defendants must transmit the travel documents to the United States Embassy in Amman, Jordan, or wherever else as may be necessary."

MR. FLESSNER: We accept that amendment. If you just [11] want to pen that in there, we can go back and type it, do whatever you want.

MR. GINSBURG: Well, Your Honor, I guess I am wondering about if this really is putting into effect the Court's ruling, because the Court found no jurisdiction regarding the issue of the revocation of his advance parole, which was his travel document. Now the Court is ordering the issuance of the travel document.

THE COURT: I am issuing—that is what I am ordering, yes.

MR. FLESSNER: We don't care what they call it.

THE COURT: If the government wants to initiate removal

proceedings as soon as he hits Chicago, they are entitled to do so. But he is entitled to be heard.

MR. FLESSNER: And we don't care what they call the travel document, whatever they want to call it, we just want him here in the United States.

MR. OSWALD: Okay, so whatever gets in here, Judge, in terms of a document, that's what you want issued according to your order.

THE COURT: Right.

MR. OSWALD: Okay.

THE COURT: So why don't we just put in after Jordan, "or wherever else it may be necessary."

MR. FLESSNER: To effectuate the order, I think is the [12] points.

MR. OSWALD: I just don't—well—

MS. ENTENMAN: Could we have a moment, Your Honor?

THE COURT: Sure.

MR. OSWALD: Judge, here is what the problem is. I don't know when his flight is or what he has got specifically. I mean, in terms of trying to do that. I don't know, to commit us to get him here by March 28th. I mean, we want to—

THE COURT: Well, he is the person who got the flight.

MR. OSWALD: Right, and he is the one that's got—

MS. ENTENMAN: Could we have a moment.

THE COURT: Sure.

MS. ENTENMAN: Thank you.

(Discussion off the record.)

MR. FLESSNER: I am told that he has booked a flight on Turkish Airlines, and it's to depart Amman on Thursday, Amman time. So we have tomorrow. Again, it's now, if my math is correct, it's somewhere after 1 a.m. in the morning in Amman. So we have eight hours tomorrow to get the documents to him so he can get on the flight the fol lowing day.

MR. OSWALD: Judge, we are just not sure why we need three if we have two.

THE COURT: I'm sorry?

MR. OSWALD: Paragraph three, if we have paragraph two, I am just not—

[13] THE COURT: You are probably right, as long as everybody understands that the more specific three is subsumed within two, let's just have the government do what's necessary so that he can catch his flight.

MR. FLESSNER: Obviously, I assume they are going to act in good faith. I am a lawyer. I just want to make sure—I mean, I don't want just the documents issued and then he not have them. Obviously, the whole purpose of this is that he has the documents so he can get on the plane so he can travel to the United States. If we all understand that, then obviously three can be deleted.

THE COURT: And I am deleting it.

And I suppose the people who it is easiest to initiate all this is you.

MR. OSWALD: Yes. I think we will be talking to our bosses and finding out what they want to do with this, you know, pending the ruling. But we will do whatever we have to do until we are told we can stop.

MR. GINSBURG: If I can raise one more point, Your Honor, and that's regarding the date, the March 28th date for the implementation of this. As we have said before, there is

nothing about cancellation of removal, which seems to be the fact and which is expiring that date, in the petition. I think it was clearly spread out in the briefs that there is no constitutional right to cancellation of removal if you apply [14] for cancellation. So whether or not he's found inadmissible has to be put in a hearing of some sort to do that. It has nothing to do with applying for cancellation of removal and forcing us to comply with this.

THE COURT: Well, except the government has taken the position that it's a provision in the statute, it's not waiveable, and that automatically, therefore, if he if he doesn't get back here by March 28th, it will be an irrebuttable presumption of having abandoned his application.

MR. GINSBURG: But whether that's true or not, there is no constitutional right to cancellation, and if the purpose of this—

THE COURT: I think we get him here by the 28th.

MR. OSWALD: Okay, Judge. Thank you, Your Honor.

MR. FLESSNER: Can we have a signed copy of the order, Your Honor?

THE CLERK: I will make a copy of it for you. Just give me. a minute. I will make a coy for you.

MR. FLESSNER: Okay. Thank you, Your Honor. Thank you very much

(Proceedings concluded.)

CERTIFICATE

I, K. Joseph Snyder, do hereby certify that the foregoing is a complete, true, and accurate transcript of the proceedings had in the above-entitled case before the Honorable JAMES B. MORAN, one of the judges, of said Court, at Chicago, Illinois, on March 25, 2003.

/s/ [Ineligible]
Official Court Reporter

APPENDIX F

[SEAL]

U.S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
10 West Jackson Boulevard
Chicago, Illinois 60604

[Jan. 17, 2003]

Mr. Sabri Ibrahim Samirah
7540 W. Wheeler Dr.
Orland Park, IL 60462
A73 354 759

Dear Mr. Samirah:

On 12/4/02, your application for advanced parole (INS Form I-131, LIN-03-029-50717) was approved by the INS Nebraska Service Center. The INS has received information indicating that you are a security risk to the United States and therefore, your advanced parole authorization is hereby revoked.

/s/ Brian R. Perryman
BRIAN R. PERRYMAN
District Director

CERTIFICATE OF SERVICE

The original of this notice was delivered to the above named alien by the undersigned on:

_____

(Date, Manner and Location of Service)

_____

Signature and Title

APPENDIX G

U.S. Department of Justice
Immigration and Naturalization Service

Authorization for Parole of an Alien into the United States

Family Name: SAMIRAH, SABRI IBRAHIM
DateIssued: 12/04/2002
Date of Birth: 01/01/1967
County of Birth: JORDAN
Address: 7540 W WHEELER DR. ORLAND PARK IL 60462

Presentation of this document will authorize a transportation line to accept the name bearer on board to travel to the United States without liability under section 273 of the Immigration and Nationality Act for bringing an alien who does not have a visa.

Presentation of the original of this document prior to 12/04/2003 will authorize an immigration officer at a port of entry in the United States to permit the name bearer, whose photograph appears hereon, to enter the United States:

X As an alien paroled pursuant to section 212(d)(5) of the Immigration and Nationality Act.

AUTHORIZATION: The named bearer was authorized to depart the United States temporarily for bona fide business or personal reasons and intends to return to the United States to await the adjudication of his/her application for adjustment of status filed under the Immigration and Nationality Act (Act). Contingent upon the applicant's prima facie eligibility, this authorization is valid for multiple applications for parole into the United States during the validity of the parole authorization noted above. Each parole period is not to exceed one year from the date of parole at the port-of-entry.

NOTICE TO APPLICANT: Presentation of this authorization will permit you to resume your application for adjustment of status upon your return to the United States, if

otherwise admissible under the Act. If your adjustment application is denied, you may be subject to removal proceedings under sections 235(b)(1) or 240 of the Act. If after April 1, 1997, you depart the United States after you were unlawfully present in the United States for more than 180 days before applying for adjustment of status, you may be found inadmissible under section 212(a)(9)(B)(i) of the Act and may not be permitted to enter when you return to the United States to resume the processing of your application. If found inadmissible, you will need to apply and qualify for a waiver of inadmissibility outside of the United States in order for your adjustment of status application to be approved.

/s/ Terry E. Way
TERRY E. WAY
Signature of Immigration Officer

Nebraska Service Center
850 "S" Street
Lincoln, NE 68508
Authorizing Officer

APPENDIX H

INS INSPECTOR'S FIELD MANUAL

Chapter 16 Special Classes 1

INS Manuals § [16.1]

§ [16.1] [Parole]

[*Editor's Note: In the INS Inspector's Field Manual materials received from INS under the Freedom of Information Act, a quantity of material from the beginnning of section 16.1, including the section title, all of subsection (a), and the title and beginning text of subsection (b), was omitted. The materials received from INS began at a point within subsection (b).*]

[(a)]—

[*Editor's Note: Subsection (a) omitted in Inspector's Field Manual materials received from INS under Freedom of Information Act.*]

(b)—

[*Editor's Note: Subsection (b) title and beginning of subsection text omitted in IFM materials received from INS under Freedom of Information Act. In the materials received from INS, the text begins mid-sentence as follows:*] imaged ADIT-style photograph, and the facsimile stamp of the district director for the issuing district. [*Approximately one line of text omitted here by INS, invoking exemption under Freedom of Information Act.*] The terms and conditions of parole, including the duration of the parole, are specified on the form. When an advance authorization is prepared by a consular official rather than an immigration officer, it will be issued on Department of State letterhead. These letters are commonly referred to as "transportation letters" or "boarding letters" since they are addressed to the transportation line and

absolve the line of liability for the fine ordinarily incurred when a carrier transports an alien without a required visa.

Ordinarily, processing of paroles is handled in secondary, where there is time to access automated systems to verify the request. When you encounter an I-512 or boarding letter during the inspection process, examine it closely. Counterfeit and altered forms have been encountered. Question the applicant concerning the basis of their parole, to determine if his or her explanation and the basis on which the parole was issued are consistent. For example, an alien who has not previously been in the U.S. should not have a parole document indicating a pending adjustment or asylum application as the basis of issuance.

Once you are satisfied that the person is entitled to parole, endorse the I-94 with the parole stamp, indicate in the appropriate block the basis of parole (e.g. "I-512, adjustment applicant"), the date to which paroled (or indefinite), the date of action, port and your stamp number. Similarly endorse the action block on the I-512 and the alien's passport. If the I-512 is valid for a single entry, collect it and forward it to the files control office where the advance parole was issued. If the I-512 is valid for multiple entries, return it to the applicant, after making a photocopy for forwarding to the issuing office. If the alien parolee is permitted employment and does not have an employment authorization document advise the applicant about filing procedures. Special handling procedures described in Chapter 15.11 also apply to holders of Forms I-512 who are nationals of the affected countries. Handle the I-94 arrival and departure sections in the same manner as other nonimmigrant Forms I-94.

(c)—Port-of-entry paroles.

Local policy control procedures for authorization of most paroles at ports-of-entry. Parole is often an appropriate alternative for emergent medical treatment or other similar

situations. Unlike a request for an advance parole, a request for parole at a port of entry requires neither a fee nor an application. Except for paroles of less than 1 day for border functions or certain NATO activities as described in Chapter 11.2, every parole action requires preparation of Form I-94, endorsed with the parole stamp as described above. In any case where an alien passenger arriving by air or sea is paroled because he or she lacks the proper visa, consider institution of fine proceedings against the carrier, as discussed in Chapter 43. In addition, prepare Form I-160, which is retained at the portof-entry as a record of the action taken. Institute fine proceedings, when applicable.

(d)—Parole of crewmembers.

Policies and procedures for parole of alien crewmembers are discussed in Chapter 23.12

(e)—Parole for deferred inspection.

Procedures for parole of aliens whose inspection is deferred are discussed in Chapter 17.1

(f)—Special Interest paroles.

Service informants and aliens entering as witnesses in criminal cases may be paroled only upon the authorization of the district director, chief patrol agent, or his specified delegate, based on a request by an assistant district director for Investigations. Parole in such instances is to be used only when an applicant is not admissible under any other provision of law. The entry and departure of such parolees must be carefully monitored. If a parole request originates from another Federal, State or local agency, it may be granted only when it is in writing, from the highest ranking official of the agency having jurisdiction over the area. The written request must contain a statement that the entry is required for official purposes, the expected duration and an explanation of how the parolee will be maintained while present in the U.S.

Paroles at the request of the Drug Enforcement Agency (DEA) are considered separately in paragraph (g), below.

(g)—Paroles for DEA purposes.

Requests for parole by the DEA generally involve large international drug trafficking investigations. Most defendants and witnesses in such cases are inadmissible to the U.S. for various reasons. In order to insure such requests are justifiable and necessary in support of the DEA mission, these requests are to be coordinated through DEA Headquarters. Immigration officers receiving such requests locally should advise Headquarters, Inspections Division.

If a local DEA agent requests that a witness, defendant or informant be re-paroled, given advance parole or allowed to remain in the U.S. when out of status, first time requests may be granted locally by the district director for a period not to exceed 6 months. Subsequent requests for such cases should be routed through DEA Headquarters.

(h)—Conditional Entrants, Refugee-Parolees, Lautenberg Parolees and Others.

Over the years the Attorney General, acting through the Service, has used his or her authority to admit or parole various groups of individuals who may or may not have the characteristics of, and identify themselves as, refugees. These groups of individuals are different from those admitted as refugees under section 207 of the Act or those granted asylum under section 208 of the Act. In order to determine the various types of benefits for which they may be eligible, it is necessary to have a working knowledge of the terms and groups involved:

> DISPLACED PERSONS—Under the Displaced Persons Act of 1948, the first legislation enacted specifically for refugees in the nation's history, the United States admitted more than 400,000 persons who were displaced

by World War II and its aftermath. Someone admitted in this category is eligible to be issued a Refugee Travel Document.

HUNGARIAN REFUGEES—Under the Hungarian Refugee Act of July 25, 1958, persons who were paroled into the United States as refugees from the Hungarian uprising of October 1956, and who had been in such parole status for at least two years, could be reinspected and admitted to the United States for permanent residence, without regard to the immigrant visa requirement. Someone paroled in this category is eligible to be issued a Refugee Travel Document.

CUBAN PAROLEES—Since 1959 several hundred thousand Cubans have been paroled into the United States. Under legislation enacted November 2, 1966, such individuals who have been physically present in the U.S. can apply for adjustment of status to that of LPR. Permanent in such cases is granted as of the date of the person's entry into the United States or thirty months prior to the date the person applied for adjustment, whichever is later. Someone paroled in this category is not eligible to be issued a Refugee Travel Document.

CONDITIONAL ENTRANTS—Prior to the 1980 Refugee Act, the United States admitted persons fleeing from persecution in communist countries of the Eastern Hemisphere and in countries within the general area of the Middle East under section 203(a)(7) of the Act. Under a proviso to that section, a limited number of individuals who were already in the United States could apply for adjustment to conditional entrant status. After two years in the United States (which was later reduced to one year) as a conditional entrant, the alien could be reinspected and admitted for permanent residence. Someone admitted in this category is eligible to be issued a Refugee Travel Document.

REFUGEE-PAROLEES—Prior to May 18, 1980, the Service used its authority in section 212(d)(5) of the Act to parole certain refugees into the United States, including many who, while fearing persecution, were not from communist countries or countries within the general area of the Middle East. Such persons were allowed to apply for adjustment of status after two years (later reduced to one year) in the United States. Someone' paroled in this category is eligible to be issued a Refugee Travel Document.

VICAM REFUGEES—Following the fall of South Vietnam and Cambodia in 1975; the United States paroled more than 400,000 persons from Indochina. Under legislation enacted on October 28, 1977, those individuals (and certain others who were already in the United States in nonimmigrant or parolee status on March 31, 1975) were allowed to adjust to LPR status. Someone paroled in this category is eligible to be issued a Refugee Travel Document.

CUBAN-HAITIAN ENTRANTS—An estimated 125,000 Cubans from the port of Mariel, Cuba the United States shortly after the enactment of the Refugee Act of 1980. There were also a considerably smaller number of Haitian nationals who entered the United States at about the same time. These individuals were not classified as refugees, but rather as "entrants." Beginning in 1984, the Service began adjusting those Cubans entrants who were otherwise admissible to LPR status under the provisions of the 1966 Cuban Adjustment Act. The status of Cuban/ Haitian entrants was not finally resolved until the enactment of the Immigration Reform and Control Act of 1986 (IRCA), which included special legislative provisions. Someone in this category is NOT eligible to be issued a Refugee Travel Document.

LAUTENBERG PAROLEES—As part of a program under the Lautenberg Amendment first included in the Department of State's appropriation bill for FY 1990, and extended thereafter, certain individuals from the former Soviet Union, or from Estonia, Latvia or Lithuania, who are found to be ineligible for refugee classification are offered parole by the Service. Those individuals include (but are not necessarily limited to) Jews, Evangelical Christians, and Ukrainian Christians of the Orthodox and Roman Catholic denominations. Prior to mid-1994, Lautenberg paroles were also offered to certain Vietnamese, Cambodians, and Laotians. After one year in the United States, parolees under the Lautenberg Amendment can apply for adjustment of status to that of LPR under section 245 of the Act, without regard to quota. Someone paroled in this category is NOT eligible to be issued a Refugee Travel Document.

(Former paragraph (h) redesignated (i), new paragraph (h) added IN98-14)

(i)—Reparoles.

Whenever you change the purpose or duration of a parole, a new I-94 must be prepared and processed. Collect the original departure section and forward it for data entry with the new arrival section. Give the new departure section to the alien. (Redesignated IN98-14)

(j)—Termination of Parole.

Under section 212(d)(5) of the Act, when the purposes of a parole have been served, the paroled alien is to be returned to the custody from which he or she was paroled and his or her case is to be dealt with in the same manner as that of any other applicant for admission. If such alien is found to be admissible, he or she may be admitted (if necessary, with the approval of an appropriate If not found admissible, the alien

may be allowed to withdraw his or her application for admission and depart, or the alien may be prepared for removal proceedings. If the alien was paroled into the United States after arriving as a crewman, stowaway, VWPP applicant or S nonimmigrant, the alien is not entitled to formal proceedings; otherwise, the type of removal proceeding involved depends upon the manner in which parole was authorized, whether the alien met the definition of arriving alien at time of parole, and the inadmissibility charge(s) being lodged:

> 1. If the alien's parole was authorized pursuant to an Advance Authorization for Parole (Form I-512) which was issued while the alien was in the United States in order to allow the alien to return to this country, the expedited removal process does not apply and the alien should be placed in removal proceedings under section 240 of the Act as an inadmissible alien, regardless of the grounds of inadmissibility.
>
> 2. If the alien does not meet the definition of "arriving alien" contained in 8 CFR 1.1(g), the expedited removal process does not apply and the alien should be placed in removal proceedings under section 240 of the Act.
>
> 3. If neither 1 nor 2 apply, and the alien is inadmissible under sections 212(a)(6)(C) and/or 212(a)(7), he or she shall be processed under the provisions of the expedited removal program in accordance with section 235(b)(1)(A)(i) of the Act and chapix 17.15 of this manual.
>
> 4. If neither 1 nor 2 apply, and the alien is inadmissible under grounds other than, or in addition to (if the Service decides to apply such additional charges), sections 212(a)(6)(C) or 212(a)(7), the alien will be prepared for removal proceedings under section 240 of the Act.

An alien who is in the expedited removal process and who expresses fear of persecution or torture, or a desire to apply

for asylum, must be referred for a credible fear determination by an asylum officer. If such alien is found to have a credible fear of persecution, the alien shall be referred to an immigration judge for a removal hearing under section 240 of the Act.

However, if an alien whose parole has been terminated has already been found to have a credible fear of persecution (e.g., as part of the original decision to parole the alien), there is no need for a referral to an asylum officer for a new credible fear determination. Instead, the alien should be referred directly to an immigration judge for a removal hearing under section 240 of the Act. In so referring the alien, the processing officer shall follow the procedures set forth in chapter 17.6. Form I-862 shall indicate that the alien is an arriving alien (block 1) and that the notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution, in addition to listing the allegations, specifications and other information which must be provided. The record of proceeding file should also contain a copy of any credible fear determination made previously.

If an alien whose parole has been terminated, and who was previously found to have a credible fear of persecution, states in his or her sworn statement that he or she no longer has a fear *of* persecution or torture and that he or she wishes to withdraw his or her application for admission and depart, the processing officer may allow the alien to do so in lieu of processing the case for a hearing. The officer must make sure that the alien is making an informed decision. The officer may wish to consult with the Asylum Office before proceeding. However, if the alien does not wish to withdraw his or her application for admission and depart from the United States, the officer must process the case for a hearing under section 240 before the immigration judge. The processing

officer does not have an option of issuing an expedited removal order. (Added IN98-14)

1. Editor's Note: The INS Inspector's Field Manual was obtained from INS under the Freedom of Information Act (FOIA). In the materials received for chapter 16, the chapter title, the chapter synopsis, the "References" to statutes and regulations, and the beginning' portion of section 16.01 were omitted. The chapter title and chapter synopsis provided here were obtained from the main table of contents that was included in the materials received.

APPENDIX I

U.S. Const. Art. I § 8, cl. 4 (2004).

Clause 4. Naturalization and Bankruptcy

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

* * * *

U.S. Const. Amend. V

Fifth Amendment—Rights of Persons

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV.

Fourteenth Amendment—Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion

against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX J

UNITED STATES CODE

TITLE 8—ALIENS AND NATIONALITY
CHAPTER 12—IMMIGRATION AND NATIONALITY
SUBCHAPTER II—IMMIGRATION
PART I—SELECTION SYSTEM

8 U.S.C. § 1153 (2004).

Sec. 1153. Allocation of immigrant visas

(a) Preference allocation for family-sponsored immigrants Aliens subject to the worldwide level specified in section 1151(c) of this title for family-sponsored immigrants shall be allotted visas as follows:

(1) Unmarried sons and daughters of citizens

Qualified immigrants who are the unmarried sons or daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the class specified in paragraph (4).

(2) Spouses and unmarried sons and unmarried daughters of permanent resident aliens

Qualified immigrants—

(A) who are the spouses or children of an alien lawfully admitted for permanent residence, or

(B) who are the unmarried sons or unmarried daughters (but are not the children) of an alien lawfully admitted for permanent residence, shall be allocated visas in a number not to exceed 114,200, plus the number (if any) by which such worldwide level exceeds 226,000, plus any visas not required for the class specified in paragraph (1); except that not less than 77 percent of such visa numbers shall be allocated to aliens described in subparagraph (A).

(3) Married sons and married daughters of citizens

Qualified immigrants who are the married sons or married daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the classes specified in paragraphs (1) and (2).

(4) Brothers and sisters of citizens

Qualified immigrants who are the brothers or sisters of citizens of the United States, if such citizens are at least 21 years of age, shall be allocated visas in a number not to exceed 65,000, plus any visas not required for the classes specified in paragraphs (1) through (3).

(b) Preference allocation for employment-based immigrants Aliens subject to the worldwide level specified in section 1151(d) of this title for employment-based immigrants in a fiscal year shall be allotted visas as follows:

(1) Priority workers

Visas shall first be made available in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (4) and (5), to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability

An alien is described in this subparagraph if—

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

(B) Outstanding professors and researchers

An alien is described in this subparagraph if—

(i) the alien is recognized internationally as outstanding in a specific academic area,

(ii) the alien has at least 3 years of experience in teaching or research in the academic area, and

(iii) the alien seeks to enter the United States—

(I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,

(II) for a comparable position with a university or institution of higher education to conduct research in the area, or

(III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

(C) Certain multinational executives and managers

An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability

(A) In general

Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraph (1), to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer

The Attorney General may, when he deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

(C) Determination of exceptional ability

In determining under subparagraph (A) whether an immigrant has exceptional ability, the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability.

(3) Skilled workers, professionals, and other workers

(A) In general

Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (1) and (2), to

the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers

Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(ii) Professionals

Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

(iii) Other workers

Other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(B) Limitation on other workers

Not more than 10,000 of the visas made available under this paragraph in any fiscal year may be available for qualified immigrants described in subparagraph (A)(iii).

(C) Labor certification required

An immigrant visa may not be issued to an immigrant under subparagraph (A) until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 1182(a)(5)(A) of this title.

(4) Certain special immigrants

Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified special immigrants described in section 1101(a)(27) of this title (other than those described in subparagraph (A) or (B)

thereof), of which not more than 5,000 may be made available in any fiscal year to special immigrants described in subclause (II) or (III) of section 1101(a)(27)(C)(ii) of this title.

(5) Employment creation

(A) In general

Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise—

(i) which the alien has established,

(ii) in which such alien has invested (after November 29, 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and

(iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

(B) Set-aside for targeted employment areas

(i) In general

Not less than 3,000 of the visas made available under this paragraph in each fiscal year shall be reserved for qualified immigrants who establish a new commercial enterprise described in subparagraph (A) which will create employment in a targeted employment area.

(ii) "Targeted employment area" defined

In this paragraph, the term "targeted employment area" means, at the time of the investment, a rural area or an area

which has experienced high unemployment (of at least 150 percent of the national average rate).

(iii) "Rural area" defined

In this paragraph, the term "rural area" means any area other than an area within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States).

(C) Amount of capital required

(i) In general

Except as otherwise provided in this subparagraph, the amount of capital required under subparagraph (A) shall be $1,000,000. The Attorney General, in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified under the previous sentence.

(ii) Adjustment for targeted employment areas

The Attorney General may, in the case of investment made in a targeted employment area, specify an amount of capital required under subparagraph (A) that is less than (but not less than 1/2 of) the amount specified in clause (i).

(iii) Adjustment for high employment areas

In the case of an investment made in a part of a metropolitan statistical area that at the time of the investment—

(I) is not a targeted employment area, and

(II) is an area with an unemployment rate significantly below the national average unemployment rate, the Attorney General may specify an amount of capital required under subparagraph (A) that is greater than (but not greater than 3 times) the amount specified in clause (i).

(6) Special rules for "K" special immigrants

(A) Not counted against numerical limitation in year involved

Subject to subparagraph (B), the number of immigrant visas made available to special immigrants under section 1101(a)(27)(K) of this title in a fiscal year shall not be subject to the numerical limitations of this subsection or of section 1152(a) of this title.

(B) Counted against numerical limitations in following year

(i) Reduction in employment-based immigrant classifications

The number of visas made available in any fiscal year under paragraphs (1), (2), and (3) shall each be reduced by 1/3 of the number of visas made available in the previous fiscal year to special immigrants described in section 1101(a)(27)(K) of this title.

(ii) Reduction in per country level

The number of visas made available in each fiscal year to natives of a foreign state under section 1152(a) of this title shall be reduced by the number of visas made available in the previous fiscal year to special immigrants described in section 1101(a)(27)(K) of this title who are natives of the foreign state.

(iii) Reduction in employment-based immigrant classifications within per country ceiling

In the case of a foreign state subject to section 1152(e) of this title in a fiscal year (and in the previous fiscal year), the number of visas made available and allocated to each of paragraphs (1) through (3) of this subsection in the fiscal year shall be reduced by 1/3 of the number of visas made available in the previous fiscal year to special immigrants described in

section 1101(a)(27)(K) of this title who are natives of the foreign state.

(c) Diversity immigrants

(1) In general

Except as provided in paragraph (2), aliens subject to the worldwide level specified in section 1151(e) of this title for diversity immigrants shall be allotted visas each fiscal year as follows:

(A) Determination of preference immigration

The Attorney General shall determine for the most recent previous 5-fiscal-year period for which data are available, the total number of aliens who are natives of each foreign state and who (i) were admitted or otherwise provided lawful permanent resident status (other than under this subsection) and (ii) were subject to the numerical limitations of section 1151(a) of this title (other than paragraph (3) thereof) or who were admitted or otherwise provided lawful permanent resident status as an immediate relative or other alien described in section 1151(b)(2) of this title.

(B) Identification of high-admission and low-admission regions and high-admission and low-admission states

The Attorney General—

(i) shall identify—

(I) each region (each in this paragraph referred to as a "high-admission region") for which the total of the numbers determined under subparagraph (A) for states in the region is greater than 1/6 of the total of all such numbers, and

(II) each other region (each in this paragraph referred to as a "low-admission region"); and

(ii) shall identify—

(I) each foreign state for which the number determined under subparagraph (A) is greater than 50,000 (each such state in this paragraph referred to as a "high-admission state"), and

(II) each other foreign state (each such state in this paragraph referred to as a "low-admission state").

(C) Determination of percentage of worldwide immigration attributable to high-admission regions

The Attorney General shall determine the percentage of the total of the numbers determined under subparagraph (A) that are numbers for foreign states in high-admission regions.

(D) Determination of regional populations excluding high-admission states and ratios of populations of regions within low-admission regions and high-admission regions The Attorney General shall determine—

(i) based on available estimates for each region, the total population of each region not including the population of any high-admission state;

(ii) for each low-admission region, the ratio of the population of the region determined under clause (i) to the total of the populations determined under such clause for all the low-admission regions; and

(iii) for each high-admission region, the ratio of the population of the region determined under clause (i) to the total of the populations determined under such clause for all the high-admission regions.

(E) Distribution of visas

(i) No visas for natives of high-admission states

The percentage of visas made available under this paragraph to natives of a high-admission state is 0.

(ii) For low-admission states in low-admission regions

Subject to clauses (iv) and (v), the percentage of visas made available under this paragraph to natives (other than natives of a high-admission state) in a low-admission region is the product of—

(I) the percentage determined under subparagraph (C), and

(II) the population ratio for that region determined under subparagraph (D)(ii).

(iii) For low-admission states in high-admission regions

Subject to clauses (iv) and (v), the percentage of visas made available under this paragraph to natives (other than natives of a high-admission state) in a high-admission region is the product of—

(I) 100 percent minus the percentage determined under subparagraph (C), and

(II) the population ratio for that region determined under subparagraph (D)(iii).

(iv) Redistribution of unused visa numbers

If the Secretary of State estimates that the number of immigrant visas to be issued to natives in any region for a fiscal year under this paragraph is less than the number of immigrant visas made available to such natives under this paragraph for the fiscal year, subject to clause (v), the excess visa numbers shall be made available to natives (other than natives of a high-admission state) of the other regions in proportion to the percentages otherwise specified in clauses (ii) and (iii).

(v) Limitation on visas for natives of a single foreign state

The percentage of visas made available under this paragraph to natives of any single foreign state for any fiscal year shall not exceed 7 percent.

(F) "Region" defined

Only for purposes of administering the diversity program under this subsection, Northern Ireland shall be treated as a separate foreign state, each colony or other component or dependent area of a foreign state overseas from the foreign state shall be treated as part of the foreign state, and the areas described in each of the following clauses shall be considered to be a separate region:

(i) Africa.

(ii) Asia.

(iii) Europe.

(iv) North America (other than Mexico).

(v) Oceania.

(vi) South America, Mexico, Central America, and the Caribbean.

(2) Requirement of education or work experience

An alien is not eligible for a visa under this subsection unless the alien—

(A) has at least a high school education or its equivalent, or

(B) has, within 5 years of the date of application for a visa under this subsection, at least 2 years of work experience in an occupation which requires at least 2 years of training or experience.

(3) Maintenance of information

The Secretary of State shall maintain information on the age, occupation, education level, and other relevant

characteristics of immigrants issued visas under this subsection.

(d) Treatment of family members

A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 1101(b)(1) of this title shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c) of this section, be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

(e) Order of consideration

(1) Immigrant visas made available under subsection (a) or (b) of this section shall be issued to eligible immigrants in the order in which a petition in behalf of each such immigrant is filed with the Attorney General (or in the case of special immigrants under section 1101(a)(27)(D) of this title, with the Secretary of State) as provided in section 1154(a) of this title.

(2) Immigrant visa numbers made available under subsection (c) of this section (relating to diversity immigrants) shall be issued to eligible qualified immigrants strictly in a random order established by the Secretary of State for the fiscal year involved.

(3) Waiting lists of applicants for visas under this section shall be maintained in accordance with regulations prescribed by the Secretary of State.

(f) Authorization for issuance

In the case of any alien claiming in his application for an immigrant visa to be described in section 1151(b)(2) of this title or in subsection (a), (b), or (c) of this section, the consular officer shall not grant such status until he has been authorized to do so as provided by section 1154 of this title.

(g) Lists

For purposes of carrying out the Secretary's responsibilities in the orderly administration of this section, the Secretary of State may make reasonable estimates of the anticipated numbers of visas to be issued during any quarter of any fiscal year within each of the categories under subsections (a), (b), and (c) of this section and to rely upon such estimates in authorizing the issuance of visas. The Secretary of State shall terminate the registration of any alien who fails to apply for an immigrant visa within one year following notification to the alien of the availability of such visa, but the Secretary shall reinstate the registration of any such alien who establishes within 2 years following the date of notification of the availability of such visa that such failure to apply was due to circumstances beyond the alien's control.

UNITED STATES CODE

TITLE 8—ALIENS AND NATIONALITY
CHAPTER 12—IMMIGRATION AND NATIONALITY
SUBCHAPTER II—IMMIGRATION
PART IV—INSPECTION, APPREHENSION, EXAMINATION, EXCLUSION, AND REMOVAL

8 U.S.C. § 1225 (2004).

Section 1225. Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing

(a) Inspection

(1) Aliens treated as applicants for admission

An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.

(2) Stowaways

An arriving alien who is a stowaway is not eligible to apply for admission or to be admitted and shall be ordered removed upon inspection by an immigration officer. Upon such inspection if the alien indicates an intention to apply for asylum under Section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview under subsection (b)(1)(B) of this section. A stowaway may apply for asylum only if the stowaway is found to have a credible fear of persecution under subsection (b)(1)(B) of this section. In no case may a stowaway be considered an applicant for admission or eligible for a hearing under section 1229a of this title.

(3) Inspection

All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to

or transit through the United States shall be inspected by immigration officers.

(4) Withdrawal of application for admission

An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States.

(5) Statements

An applicant for admission may be required to state under oath any information sought by an immigration officer regarding the purposes and intentions of the applicant in seeking admission to the United States, including the applicant's intended length of stay and whether the applicant intends to remain permanently or become a United States citizen, and whether the applicant is inadmissible.

(b) Inspection of applicants for admission

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening

(i) In general

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

(ii) Claims for asylum

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is

inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

(iii) Application to certain other aliens

(I) In general

The Attorney General may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause (II) as designated by the Attorney General. Such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time.

(II) Aliens described

An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph.

(B) Asylum interviews

(i) Conduct by asylum officers

An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the Attorney General.

(ii) Referral of certain aliens

If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum.

(iii) Removal without further review if no credible fear of persecution

(I) In general

Subject to subclause (III), if the officer determines that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review.

(II) Record of determination

The officer shall prepare a written record of a determination under subclause (I). Such record shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in the light of such facts, the alien has not established a credible fear of persecution. A copy of the officer's interview notes shall be attached to the written summary.

(III) Review of determination

The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).

(IV) Mandatory detention

Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.

(iv) Information about interviews

The Attorney General shall provide information concerning the asylum interview described in this subparagraph to aliens who may be eligible. An alien who is eligible for such interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process.

(v) "Credible fear of persecution" defined

For purposes of this subparagraph, the term "credible fear of persecution" means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title.

(C) Limitation on administrative review

Except as provided in subparagraph (B)(iii)(III), a removal order entered in accordance with subparagraph (A)(i) or (B)(iii)(I) is not subject to administrative appeal, except that the Attorney General shall provide by regulation for prompt review of such an order under subparagraph (A)(i) against an alien who claims under oath, or as permitted under penalty of perjury under section 1746 of title 28, after having been warned of the penalties for falsely making such claim under such conditions, to have been lawfully admitted for permanent residence, to have been admitted as a refugee under section 1157 of this title, or to have been granted asylum under section 1158 of this title.

(D) Limit on collateral attacks

In any action brought against an alien under section 1325(a) of this title or section 1326 of this title, the court shall not have jurisdiction to hear any claim attacking the validity

of an order of removal entered under subparagraph (A)(i) or (B)(iii).

(E) "Asylum officer" defined

As used in this paragraph, the term "asylum officer" means an immigration officer who—

(i) has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications under section 1158 of this title, and

(ii) is supervised by an officer who meets the condition described in clause (i) and has had substantial experience adjudicating asylum applications.

(F) Exception

Subparagraph (A) shall not apply to an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry.

(2) Inspection of other aliens

(A) In general

Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

(B) Exception

Subparagraph (A) shall not apply to an alien—

(i) who is a crewman,

(ii) to whom paragraph (1) applies, or

(iii) who is a stowaway.

(C) Treatment of aliens arriving from contiguous territory

In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

(3) Challenge of decision

The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien whose privilege to be admitted is so challenged, before an immigration judge for a proceeding under section 1229a of this title.

(c) Removal of aliens inadmissible on security and related grounds

(1) Removal without further hearing

If an immigration officer or an immigration judge suspects that an arriving alien may be inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 1182(a)(3) of this title, the officer or judge shall—

(A) order the alien removed, subject to review under paragraph (2);

(B) report the order of removal to the Attorney General; and

(C) not conduct any further inquiry or hearing until ordered by the Attorney General.

(2) Review of order

(A) The Attorney General shall review orders issued under paragraph (1).

(B) If the Attorney General—

(i) is satisfied on the basis of confidential information that the alien is inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 1182(a)(3) of this title, and

(ii) after consulting with appropriate security agencies of the United States Government, concludes that disclosure of the information would be prejudicial to the public interest, safety, or security, the Attorney General may order the alien removed without further inquiry or hearing by an immigration judge.

(C) If the Attorney General does not order the removal of the alien under subparagraph (B), the Attorney General shall specify the further inquiry or hearing that shall be conducted in the case.

(3) Submission of statement and information

The alien or the alien's representative may submit a written statement and additional information for consideration by the Attorney General.

(d) Authority relating to inspections

(1) Authority to search conveyances

Immigration officers are authorized to board and search any vessel, aircraft, railway car, or other conveyance or vehicle in which they believe aliens are being brought into the United States.

(2) Authority to order detention and delivery of arriving aliens Immigration officers are authorized to order an owner, agent, master, commanding officer, person in charge, purser, or consignee of a vessel or aircraft bringing an alien (except an alien crewmember) to the United States—

(A) to detain the alien on the vessel or at the airport of arrival, and

(B) to deliver the alien to an immigration officer for inspection or to a medical officer for examination.

(3) Administration of oath and consideration of evidence

The Attorney General and any immigration officer shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, transit through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service.

(4) Subpoena authority

(A) The Attorney General and any immigration officer shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and to that end may invoke the aid of any court of the United States.

(B) Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer may, in the event of neglect or refusal to respond to a subpoena issued under this paragraph or refusal to testify before an immigration officer, issue an order requiring such persons to appear before an immigration officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

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8 U.S.C. § 1225a (2004).

Section 1225a. Preinspection at foreign airports

(a) Establishment of preinspection stations

(1) New stations

Subject to paragraph (5), not later than October 31, 1998, the Attorney General, in consultation with the Secretary of State, shall establish and maintain preinspection stations in at least 5 of the foreign airports that are among the 10 foreign airports which the Attorney General identifies as serving as last points of departure for the greatest numbers of inadmissible alien passengers who arrive from abroad by air at ports of entry within the United States. Such preinspection stations shall be in addition to any preinspection stations established prior to September 30, 1996.

(2) Report

Not later than October 31, 1998, the Attorney General shall report to the Committees on the Judiciary of the House of Representatives and of the Senate on the implementation of paragraph (1).

(3) Data collection

Not later than November 1, 1997, and each subsequent November 1, the Attorney General shall compile data identifying—

(A) the foreign airports which served as last points of departure for aliens who arrived by air at United States ports

of entry without valid documentation during the preceding fiscal years;

(B) the number and nationality of such aliens arriving from each such foreign airport; and

(C) the primary routes such aliens followed from their country of origin to the United States.

(4) Additional stations

Subject to paragraph (5), not later than October 31, 2000, the Attorney General, in consultation with the Secretary of State, shall establish preinspection stations in at least 5 additional foreign airports which the Attorney General, in consultation with the Secretary of State, determines, based on the data compiled under paragraph (3) and such other information as may be available, would most effectively reduce the number of aliens who arrive from abroad by air at points of entry within the United States who are inadmissible to the United States. Such preinspection stations shall be in addition to those established prior to September 30, 1996, or pursuant to paragraph (1).

(5) Conditions

Prior to the establishment of a preinspection station, the Attorney General, in consultation with the Secretary of State, shall ensure that—

(A) employees of the United States stationed at the preinspection station and their accompanying family members will receive appropriate protection;

(B) such employees and their families will not be subject to unreasonable risks to their welfare and safety; and

(C) the country in which the preinspection station is to be established maintains practices and procedures with respect to asylum seekers and refugees in accordance with the Convention Relating to the Status of Refugees (done at

Geneva, July 28, 1951), or the Protocol Relating to the Status of Refugees (done at New York, January 31, 1967), or that an alien in the country otherwise has recourse to avenues of protection from return to persecution.

(b) Establishment of carrier consultant program

The Attorney General shall assign additional immigration officers to assist air carriers in the detection of fraudulent documents at foreign airports which, based on the records maintained pursuant to subsection (a)(3) of this section, served as a point of departure for a significant number of arrivals at United States ports of entry without valid documentation, but where no preinspection station exists.

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8 U.S.C. § 1228 (2004).

Section 1228.. Expedited removal of aliens convicted of committing aggravated felonies

(a) Removal of criminal aliens

(1) in general

The Attorney General shall provide for the availability of special removal proceedings at certain Federal, State, and local correctional facilities for aliens convicted of any criminal offense covered in section 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 1227(a)(2)(A)(i) of this title. Such proceedings shall be conducted in conformity with section 1229a of this title (except as otherwise provided in this section), and in a manner which eliminates the need for additional detention at any processing center of the Service and in a manner which assures expeditious removal following the end of the alien's incarceration for the underlying sentence. Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(2) Implementation

With respect to an alien convicted of an aggravated felony who is taken into custody by the Attorney General pursuant to section 1226(c) of this title, the Attorney General shall, to the

maximum extent practicable, detain any such felon at a facility at which other such aliens are detained. In the selection of such facility, the Attorney General shall make reasonable efforts to ensure that the alien's access to counsel and right to counsel under section 1362 of this title are not impaired.

(3) Expedited proceedings

(A) Notwithstanding any other provision of law, the Attorney General shall provide for the initiation and, to the extent possible, the completion of removal proceedings, and any administrative appeals thereof, in the case of any alien convicted of an aggravated felony before the alien's release from incarceration for the underlying aggravated felony.

(B) Nothing in this section shall be construed as requiring the Attorney General to effect the removal of any alien sentenced to actual incarceration, before release from the penitentiary or correctional institution where such alien is confined.

(4) Review

(A) The Attorney General shall review and evaluate removal proceedings conducted under this section.

(B) The Comptroller General shall monitor, review, and evaluate removal proceedings conducted under this section. Within 18 months after the effective date of this section, the Comptroller General shall submit a report to such Committees concerning the extent to which removal proceedings conducted under this section may adversely affect the ability of such aliens to contest removal effectively.

(b) Removal of aliens who are not permanent residents

(1) The Attorney General may, in the case of an alien described in paragraph (2), determine the deportability of such alien under section 1227(a)(2)(A)(iii) of this title (relating to conviction of an aggravated felony) and issue an

order of removal pursuant to the procedures set forth in this subsection or section 1229a of this title.

(2) An alien is described in this paragraph if the alien—

(A) was not lawfully admitted for permanent residence at the time at which proceedings under this section commenced; or

(B) had permanent resident status on a conditional basis (as described in section 1186a of this title) at the time that proceedings under this section commenced.

(3) The Attorney General may not execute any order described in paragraph (1) until 14 calendar days have passed from the date that such order was issued, unless waived by the alien, in order that the alien has an opportunity to apply for judicial review under section 1252 of this title.

(4) Proceedings before the Attorney General under this subsection shall be in accordance with such regulations as the Attorney General shall prescribe. The Attorney General shall provide that—

(A) the alien is given reasonable notice of the charges and of the opportunity described in subparagraph (C);

(B) the alien shall have the privilege of being represented (at no expense to the government) by such counsel, authorized to practice in such proceedings, as the alien shall choose;

(C) the alien has a reasonable opportunity to inspect the evidence and rebut the charges;

(D) a determination is made for the record that the individual upon whom the notice for the proceeding under this section is served (either in person or by mail) is, in fact, the alien named in such notice;

(E) a record is maintained for judicial review; and (F) the final order of removal is not adjudicated by the same person who issues the charges.

(5) No alien described in this section shall be eligible for any relief from removal that the Attorney General may grant in the Attorney General's discretion.

(c) (FOOTNOTE 1) Presumption of deportability

(FOOTNOTE 1) So in original. Two subsecs. (c) have been enacted.

An alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States.

(c) (FOOTNOTE 1) Judicial removal

(1) Authority

Notwithstanding any other provision of this chapter, a United States district court shall have jurisdiction to enter a judicial order of removal at the time of sentencing against an alien who is deportable, if such an order has been requested by the United States Attorney with the concurrence of the Commissioner and if the court chooses to exercise such jurisdiction.

(2) Procedure

(A) The United States Attorney shall file with the United States district court, and serve upon the defendant and the Service, prior to commencement of the trial or entry of a guilty plea a notice of intent to request judicial removal.

(B) Notwithstanding section 1252b (FOOTNOTE 2) of this title, the United States Attorney, with the concurrence of the Commissioner, shall file at least 30 days prior to the date set for sentencing a charge containing factual allegations regarding the alienage of the defendant and identifying the crime or crimes which make the defendant deportable under section 1227(a)(2)(A) of this title.

(FOOTNOTE 2) See References in Text note below.

(C) If the court determines that the defendant has presented substantial evidence to establish prima facie eligibility for relief from removal under this chapter, the Commissioner shall provide the court with a recommendation and report regarding the alien's eligibility for relief. The court shall either grant or deny the relief sought.

(D)(i) The alien shall have a reasonable opportunity to examine the evidence against him or her, to present evidence on his or her own behalf, and to cross-examine witnesses presented by the Government.

(ii) The court, for the purposes of determining whether to enter an order described in paragraph (1), shall only consider evidence that would be admissible in proceedings conducted pursuant to section 1229a of this title.

(iii) Nothing in this subsection shall limit the information a court of the United States may receive or consider for the purposes of imposing an appropriate sentence.

(iv) The court may order the alien removed if the Attorney General demonstrates that the alien is deportable under this chapter.

(3) Notice, appeal, and execution of judicial order of removal (A)(i) A judicial order of removal or denial of such order may be appealed by either party to the court of appeals for the circuit in which the district court is located.

(ii) Except as provided in clause (iii), such appeal shall be considered consistent with the requirements described in section 1252 of this title.

(iii) Upon execution by the defendant of a valid waiver of the right to appeal the conviction on which the order of removal is based, the expiration of the period described in section 1252(b)(1) of this title, or the final

dismissal of an appeal from such conviction, the order of removal shall become final and shall be executed at the end of the prison term in accordance with the terms of the order. If the conviction is reversed on direct appeal, the order entered pursuant to this section shall be void.

(B) As soon as is practicable after entry of a judicial order of removal, the Commissioner shall provide the defendant with written notice of the order of removal, which shall designate the defendant's country of choice for removal and any alternate country pursuant to section 1253(a) (FOOTNOTE 2) of this title.

(4) Denial of judicial order

Denial of a request for a judicial order of removal shall not preclude the Attorney General from initiating removal proceedings pursuant to section 1229a of this title upon the same ground of deportability or upon any other ground of deportability provided under section 1227(a) of this title.

(5) Stipulated judicial order of removal

The United States Attorney, with the concurrence of the Commissioner, may, pursuant to Federal Rule of Criminal Procedure 11, enter into a plea agreement which calls for the alien, who is deportable under this chapter, to waive the right to notice and a hearing under this section, and stipulate to the entry of a judicial order of removal from the United States as a condition of the plea agreement or as a condition of probation or supervised release, or both. The United States district court, in both felony and misdemeanor cases, and a United States magistrate judge in misdemeanor cases, may accept such a stipulation and shall have jurisdiction to enter a judicial order of removal pursuant to the terms of such stipulation.

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8 U.S.C. § 1229a (2004).

Section 1229a. Removal proceedings

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

(b) Conduct of proceeding

(1) Authority of immigration judge

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of

evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.

(2) Form of proceeding

(A) In general

The proceeding may take place—

(i) in person,

(ii) where agreed to by the parties, in the absence of the alien,

(iii) through video conference, or

(iv) subject to subparagraph (B), through telephone conference.

(B) Consent required in certain cases

An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

(3) Presence of alien

If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

(4) Alien's rights in proceeding

In proceedings under this section, under regulations of the Attorney General—

(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,

(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

(5) Consequences of failure to appear

(A) In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2) of this section). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

(B) No notice if failure to provide address information

No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.

(C) Rescission of order

Such an order may be rescinded only—

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien. The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

(E) Additional application to certain aliens in contiguous territory

The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.

(6) Treatment of frivolous behavior

The Attorney General shall, by regulation—

(A) define in a proceeding before an immigration judge or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,

(B) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and (C) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior. Nothing in this

paragraph shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

(7) Limitation on discretionary relief for failure to appear

Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or (2) of section 1229(a) of this title, was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1) of this section) to attend a proceeding under this section, shall not be eligible for relief under section 1229b, 1229c, 1255, 1258, or 1259 of this title for a period of 10 years after the date of the entry of the final order of removal.

(c) Decision and burden of proof

(1) Decision

(A) In general

At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing.

(B) Certain medical decisions

If a medical officer or civil surgeon or board of medical officers has certified under section 1222(b) of this title that an alien has a disease, illness, or addiction which would make the alien inadmissible under paragraph (1) of section 1182(a) of this title, the decision of the immigration judge shall be based solely upon such certification.

(2) Burden on alien

In the proceeding the alien has the burden of establishing—

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(3) Burden on service in cases of deportable aliens

(A) In general

In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

(B) Proof of convictions

In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) An official record of judgment and conviction.

(ii) An official record of plea, verdict, and sentence.

(iii) A docket entry from court records that indicates the existence of the conviction.

(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

(C) Electronic records

In any proceeding under this chapter, any record of conviction or abstract that has been submitted by electronic means to the Service from a State or court shall be admissible as evidence to prove a criminal conviction if it is—

(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

(ii) certified in writing by a Service official as having been received electronically from the State's record repository or the court's record repository.

A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

(4) Notice

If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.

(5) Motions to reconsider

(A) In general

The alien may file one motion to reconsider a decision that the alien is removable from the United States.

(B) Deadline

The motion must be filed within 30 days of the date of entry of a final administrative order of removal.

(C) Contents

The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.

(6) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section.

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections (FOOTNOTE 1) 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

(FOOTNOTE 1) So in original.

(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) of this section is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses and children

The deadline specified in subsection (b)(5)(C) of this section for filing a motion to reopen does not apply—

(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title, or section 1229b(b)(2) of this title;

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen; and

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child.

(d) Stipulated removal

The Attorney General shall provide by regulation for the entry by an immigration judge of an order of removal stipulated to by the alien (or the alien's representative) and the Service. A stipulated order shall constitute a conclusive determination of the alien's removability from the United States.

(e) Definitions

In this section and section 1229b of this title:

(1) Exceptional circumstances

The term "exceptional circumstances" refers to exceptional circumstances (such as serious illness of the alien or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

(2) Removable

The term "removable" means—

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.

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8 U.S.C. § 1229b (2004).

Section 1229b. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title (except in a case described in section 1227(a)(7) of this title where the Attorney General exercises discretion to grant a waiver); and (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) Special rule for battered spouse or child

(A) Authority

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that—

(i)(I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen (or is the parent of a child of a United States citizen and the child has been battered or subjected to extreme cruelty by such citizen parent);

(II) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a lawful permanent resident (or is the parent of a child of an alien who is or was a lawful permanent resident and the child has been battered or subjected to extreme cruelty by such permanent resident parent); or

(III) the alien has been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident whom the alien intended to marry, but whose marriage is not legitimate because of that United States citizen's or lawful permanent resident's bigamy;

(ii) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application, and the

issuance of a charging document for removal proceedings shall not toll the 3-year period of continuous physical presence in the United States;

(iii) the alien has been a person of good moral character during such period, subject to the provisions of subparagraph (C);

(iv) the alien is not inadmissible under paragraph (2) or (3) of section 1182(a) of this title, is not deportable under paragraphs (1)(G) or (2) through (4) of section 1227(a) of this title (except in a case described in section 1227(a)(7) of this title where the Attorney General exercises discretion to grant a waiver), and has not been convicted of an aggravated felony; and

(v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

(B) Physical presence

Notwithstanding subsection (d)(2) of this section, for purposes of subparagraph (A)(i)(II) or for purposes of section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), an alien shall not be considered to have failed to maintain continuous physical presence by reason of an absence if the alien demonstrates a connection between the absence and the battering or extreme cruelty perpetrated against the alien. No absence or portion of an absence connected to the battering or extreme cruelty shall count toward the 90-day or 180-day limits established in subsection (d)(2) of this section. If any absence or aggregate absences exceed 180 days, the absences or portions of the absences will not be considered to break the period of continuous presence. Any such period of time excluded from the 180-day limit shall be excluded in computing the time during which the alien has been physically present for purposes of the 3-year requirement set

forth in subsection (b)(2)(B) of this section and section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of (1996).

(C) Good moral character

Notwithstanding section 1101(f) of this title, an act or conviction that does not bar the Attorney General from granting relief under this paragraph by reason of subparagraph (A)(iv) shall not bar the Attorney General from finding the alien to be of good moral character under subparagraph (A)(i)(III) or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty and determines that a waiver is otherwise warranted.

(D) Credible evidence considered

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

(3) Recordation of date

With respect to aliens who the Attorney General adjusts to the status of an alien lawfully admitted for permanent residence under paragraph (1) or (2), the Attorney General shall record the alien's lawful admission for permanent residence as of the date of the Attorney General's cancellation of removal under paragraph (1) or (2).

(4) Children of battered aliens and parents of battered alien children

(A) In general

The Attorney General shall grant parole under section 1182(d)(5) of this title to any alien who is a—

(i) child of an alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996); or

(ii) parent of a child alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(B) Duration of parole

The grant of parole shall extend from the time of the grant of relief under subsection (b)(2) of this section or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to the time the application for adjustment of status filed by aliens covered under this paragraph has been finally adjudicated.

Applications for adjustment of status filed by aliens covered under this paragraph shall be treated as if they were applications filed under section 1154(a)(1)(A)(iii), (A)(iv), (B)(ii), or (B)(iii) of this title for purposes of section 1255 (a) and (c) of this title. Failure by the alien granted relief under subsection (b)(2) of this section or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) may result in revocation of parole.

(c) Aliens ineligible for relief

The provisions of subsections (a) and (b)(1) of this section shall not apply to any of the following aliens:

(1) An alien who entered the United States as a crewman subsequent to June 30, 1964.

(2) An alien who was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101(a)(15)(J) of this title, or has acquired the status of such a nonimmigrant exchange alien after admission, in order to receive graduate medical education or training, regardless of whether or not the alien is subject to or has fulfilled the two-year foreign residence requirement of section 1182(e) of this title.

(3) An alien who—

(A) was admitted to the United States as a non-immigrant exchange alien as defined in section 1101(a)(15)(J) of this title or has acquired the status of such a nonimmigrant exchange alien after admission other than to receive graduate medical education or training,

(B) is subject to the two-year foreign residence requirement of section 1182(e) of this title, and

(C) has not fulfilled that requirement or received a waiver thereof.

(4) An alien who is inadmissible under section 1182(a)(3) of this title or deportable under section 1227(a)(4) of this title.

(5) An alien who is described in section 1231(b)(3)(B)(i) of this title.

(6) An alien whose removal has previously been cancelled under this section or whose deportation was suspended under section 1254(a) of this title or who has been

granted relief under section 1182(c) of this title, as such sections were in effect before September 30, 1996.

(d) Special rules relating to continuous residence or physical presence

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2) of this section, when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

(2) Treatment of certain breaks in presence

An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) of this section if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

(3) Continuity not required because of honorable service in Armed

Forces and presence upon entry into service The requirements of continuous residence or continuous physical presence in the United States under subsections (a) and (b) of this section shall not apply to an alien who—

(A) has served for a minimum period of 24 months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and

(B) at the time of the alien's enlistment or induction was in the United States.

(e) Annual limitation

(1) Aggregate limitation

Subject to paragraphs (2) and (3), the Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under section 1254(a) of this title (as in effect before September 30, 1996), of a total of more than 4,000 aliens in any fiscal year. The previous sentence shall apply regardless of when an alien applied for such cancellation and adjustment, or such suspension and adjustment, and whether such an alien had previously applied for suspension of deportation under such section 1254(a) of this title. The numerical limitation under this paragraph shall apply to the aggregate number of decisions in any fiscal year to cancel the removal (and adjust the status) of an alien, or suspend the deportation (and adjust the status) of an alien, under this section or such section 1254(a) of this title.

(2) Fiscal year 1997

For fiscal year 1997, paragraph (1) shall only apply to decisions to cancel the removal of an alien, or suspend the deportation of an alien, made after April 1, 1997.

Notwithstanding any other provision of law, the Attorney General may cancel the removal or suspend the deportation, in addition to the normal allotment for fiscal year 1998, of a number of aliens equal to 4,000 less the number of such cancellations of removal and suspensions of deportation granted in fiscal year 1997 after April 1, 1997.

(3) Exception for certain aliens

Paragraph (1) shall not apply to the following:

(A) Aliens described in section 309(c)(5)(C)(i) of the Illegal Immigration Reform and Immigrant Responsibility

Act of 1996 (as amended by the Nicaraguan Adjustment and Central American Relief Act).

(B) Aliens in deportation proceedings prior to Apri! 1, 1997, who applied for suspension of deportation under section 1254(a)(3) of this title (as in effect before September 30, 1996).

UNITED STATES CODE

TITLE 8—ALIENS AND NATIONALITY
CHAPTER 12—IMMIGRATION AND NATIONALITY
SUBCHAPTER II—IMMIGRATION
PART V—ADJUSTMENT AND CHANGE OF STATUS

8 U.S.C. § 1252 (2004).

Sec. 1252. Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law, no court shall have jurisdiction to review—

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.

UNITED STATES CODE

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE
PART IV—JURISDICTION AND VENUE
CHAPTER 81—SUPREME COURT

28 U.S.C. § 1254 (2004).

Section 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

TITLE 8—ALIENS AND NATIONALITY
CHAPTER I—IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE
PART 1—DEFINITIONS—Table of Contents

8 C.F.R. § 1.1 (2004).

Sec. 1.1 Definitions.

As used in this chapter:

(a) The terms defined in section 101 of the Immigration and Nationality Act (66 Stat. 163) shall have the meanings ascribed to them in that section and as supplemented, explained, and further defined in this chapter.

(b) The term Act means the Immigration and Nationality Act, as amended.

(c) The term Service means the Immigration and Naturalization Service.

(d) The term Commissioner means the Commissioner of Immigration and Naturalization.

(e) The term Board means the Board of Immigration Appeals.

(f) The term attorney means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia, and is not under any order of any court suspending, enjoining, restraining, disbarring, or otherwise restricting him in the practice of law.

(g) Unless the context otherwise requires, the term case means any proceeding arising under any immigration or naturalization law, Executive order, or Presidential proclamation, or preparation for or incident to such proceeding, including preliminary steps by any private person or corporation preliminary to the filing of the application or

petition by which any proceeding under the jurisdiction of the Service or the Board is initiated.

(h) The term day when computing the period of time for taking any action provided in this chapter including the taking of an appeal, shall include Saturdays, Sundays, and legal holidays, except that when the last day of the period so computed falls on a Saturday, Sunday or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, nor a legal holiday.

(i) The term practice means the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with the Service, or any officer of the Service, or the Board.

(j) The term representative refers to a person who is entitled to represent others as provided in Secs. 292.1(a) (2), (3), (4), (5), (6), and 292.1(b) of this chapter.

(k) The term preparation, constituting practice, means the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers, but does not include the lawful functions of a notary public or service consisting solely of assistance in the completion of blank spaces on printed Service forms by one whose remuneration, if any, is nominal and who does not hold himself out as qualified in legal matters or in immigration and naturalization procedure.

(l) The term immigration judge means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 240 of the Act. An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall

not be employed by the Immigration and Naturalization Service.

(m) The term representation before the Board and the Service includes practice and preparation as defined in paragraphs (i) and (k) of this section.

(n) The term Executive Office means Executive Office for Immigration Review.

(o) The term director means either district director or regional service center director, unless otherwise specified.

(p) The term lawfully admitted for permanent residence means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such [[Page 10]] status terminates upon entry of a final administrative order of exclusion or deportation.

(q) The term arriving alien means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains such even if paroled pursuant to section 212(d)(5) of the Act, except that an alien who was paroled before April 1, 1997, or an alien who was granted advance parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, shall not be considered an arriving alien for purposes of section 235(b)(1)(A)(i) of the Act.

(r) The term respondent means a person named in a Notice to Appear issued in accordance with section 239(a) of the

Act, or in an Order to Show Cause issued in accordance with Sec. 242.1 of this chapter as it existed prior to April 1, 1997.

(s) The term Service counsel means any immigration officer assigned to represent the Service in any proceeding before an immigration judge or the Board of Immigration Appeals.

(t) The term aggravated felony means a crime (or a conspiracy or attempt to commit a crime) described in section 101(a)(43) of the Act. This definition is applicable to any proceeding, application, custody determination, or adjudication pending on or after September 30, 1996, but shall apply under section 276(b) of the Act only to violations of section 276(a) of the Act occurring on or after that date.

TITLE 8—ALIENS AND NATIONALITY

CHAPTER I—IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE
PART 245—ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE—Table of Contents

8 C.F.R. § 245.2 (2004).

Sec. 245.2 Application.

(a) General—(1) Jurisdiction. An alien who believes he or she meets the eligibility requirements of section 245 of the Act or section 1 of the Act of November 2, 1966, and Sec. 245.1 shall apply to the director having jurisdiction over his or her place of residence unless otherwise instructed in 8 CFR part 245, or by the instruction on the application form. After an alien, other than an arriving alien, is in deportation or removal proceedings, his or her application for adjustment of status under section 245 of the Act or section 1 of the Act of November 2, 1966 shall be made and considered only in those proceedings. An arriving alien, other than an alien in removal proceedings, who believes he or she meets the eligibility requirements of section 245 of the Act or section 1 of the Act of November 2, 1966, and Sec. 245.1 shall apply to the director having jurisdiction over his or her place of arrival. An adjustment application by an alien paroled under section 212(d)(5) of the Act, which has been denied by the director, may be renewed in removal proceedings under 8 CFR part 240 only if:

(i) The denied application must have been properly filed subsequent to the applicant's earlier inspection and admission to the United States; and

(ii) The applicant's later absence from and return to the United States was under the terms of an advance parole authorization on Form I-512 granted to permit the applicant's

absence and return to pursue the previously filed adjustment application.

(2) Proper filing of application—(i) Under section 245. (A) An immigrant visa must be immediately available in order for an alien to properly file an adjustment appli cation under section 245 of the Act See Sec. 245.1(g)(1) to determine whether an immigrant visa is immediately available.

(B) If, at the time of filing, approval of a visa petition filed for classification under section 201(b)(2)(A)(i), section 203(a) or section 203(b)(1), (2) or (3) of the Act would make a visa immediately available to the alien beneficiary, the alien beneficiary's adjustment application will be considered properly filed whether submitted concurrently with or subsequent to the visa petition, provided that it meets the filing requirements contained in parts 103 and 245. For any other classification, the alien beneficiary may file the adjustment application only after the Service has approved the visa petition.

(C) A visa petition and an adjustment application are concurrently filed only if:

(1) The visa petitioner and adjustment applicant each file their respective form at the same time, bundled together within a single mailer or delivery packet, with the proper filing fees on the same day and at the same Service office, or;

(2) the visa petitioner filed the visa petition, for which a visa number has become immediately available, on, before or after July 31, 2002, and the adjustment applicant files the adjustment application, together with the proper filing fee and a copy of the Form I-797, Notice of Action, establishing the receipt and acceptance by the Service of the underlying Form I-140 visa petition, at the same Service office at which the visa petitioner filed the visa petition, or;

(3) The visa petitioner filed the visa petition, for which a visa number has become immediately available, on, before, or after July 31, 2002, and the adjustment applicant files the adjustment application, together with proof of payment of the filing fee with the Service and a copy of the Form I-797 Notice of Action establishing the receipt and acceptance by the Service of the underlying Form I-140 visa petition, with the Immigration Court or the Board of Immigration Appeals when jurisdiction lies under paragraph (a)(1) of this section.

(ii) Under the Act of November 2, 1966. An application for the benefits of section 1 of the Act of November 2, 1966 is not properly filed unless the applicant was inspected and admitted or paroled into the United States subsequent to January 1, 1959. An applicant is ineligible for the benefits of the Act of November 2, 1966 unless he or she has been physically present in the United States [[Page 562]] for one year (amended from two years by the Refugee Act of 1980).

(3) Submission of documents—(i) General. A separate application shall be filed by each applicant for benefits under section 245, or the Act of November 2, 1966. Each application shall be accompanied by an executed Form G-325A, if the applicant has reached his or her 14th birthday. Form G-325A shall be considered part of the application. An application under this part shall be accompanied by the document specified in the instructions which are attached to the application.

(ii) Under section 245. An application for adjustment of status is submitted on Form I-485, Application for Permanent Residence. The application must be accompanied by the appropriate fee as explained in the instructions to the application.

(iii) Under section 245(i). An alien who seeks adjustment of status under the provisions of section 245(i) of

the Act must file Form I-485, with the required fee. The alien must also file Supplement A to Form I-485, with any required additional sum.

(iv) Under the Act of November 2, 1966. An application for adjustment of status is made on Form I-485A. The application must be accompanied by Form I-643, Health and Human Services Statistical Data Sheet. The application must include a clearance from the local police jurisdiction for any area in the United States when the applicant has lived for six months or more since his or her 14th birthday.

(4) Effect of departure—(i) General. The effect of a departure from the United States is dependent upon the law under which the applicant is applying for adjustment.

(ii) Under section 245 of the Act. (A) The departure from the United States of an applicant who is under exclusion, deportation, or removal proceedings shall be deemed an abandonment of the application constituting grounds for termination of the proceeding by reason of the departure. Except as provided in paragraph (a)(4)(ii)(B) and (C) of this section, the departure of an applicant who is not under exclusion, deportation, or removal proceedings shall be deemed an abandonment of the application constituting grounds for termination of any pending application for adjustment of status, unless the applicant was previously granted advance parole by the Service for such absences, and was inspected upon returning to the United States. If the adjustment application of an individual granted advance parole is subsequently denied the individual will be treated as an applicant for admission, and subject to the provisions of section 212 and 235 of the Act.

(B) The travel outside of the United States by an applicant for adjustment who is not under exclusion, deportation, or removal proceedings shall not be deemed an abandonment of the application if he or she was previously

granted advance parole by the Service for such absences, and was inspected and paroled upon returning to the United States. If the adjustment of status application of such individual is subsequently denied, he or she will be treated as an applicant for admission, and subject to the provisions of section 212 and 235 of the Act.

(C) The travel outside of the United States by an applicant for adjustment of status who is not under exclusion, deportation, or removal proceeding and who is in lawful H-1 or L-1 status shall not be deemed an abandonment of the application if, upon returning to this country, the alien remains eligible for H or L status, is coming to resume employment with the same employer for whom he or she had previously been authorized to work as an H-1 or L-1 nonimmigrant, and, is in possession of a valid H or L visa (if required) and the original I-797 receipt notice for the application for adjustment of status. The travel outside of the United States by an applicant for adjustment of status who is not under exclusion, deportation, or removal proceeding and who is in lawful H-4 or L-2 status shall not be deemed an abandonment of the application if the spouse or parent of such alien through whom the H-4 or L-2 status was obtained is maintaining H-1 or L-1 status and the alien remains otherwise eligible for H-4 or L-2 status, and, the alien is in possession of a valid H-4 or L-2 visa (if required) and the original copy of the I-797 receipt notice for the application for adjustment of status. The travel outside of the United [[Page 563]] States by an applicant for adjustment of status, who is not under exclusion, deportation, or removal proceeding and who is in lawful K-3 or K-4 status shall not be deemed an abandonment of the application if, upon returning to this country, the alien is in possession of a valid K-3 or K-4 visa and remains eligible for K-3 or K-4 status.

(D) The travel outside of the United States by an applicant for adjustment of status who is not under exclusion,

deportation, or removal proceeding and who is in lawful V status shall not be deemed an abandonment of the application if, upon returning to this country, the alien is admissible as a V nonimmigrant.

(iii) Under the Act of November 2, 1966. If an applicant who was admitted or paroled subsequent to January 1, 1959, later departs from the United States temporarily with no intention of abandoning his or her residence, and is readmitted or paroled upon return, the temporary absence shall be disregarded for purposes of the applicant's "last arrival" into the United States in regard to cases filed under section 1 of the Act of November 2, 1966.

(5) Decision—(i) General. The applicant shall be notified of the decision of the director and, if the application is denied, the reasons for the denial.

(ii) Under section 245 of the Act. If the application is approved, the applicant's permanent residence shall be recorded as of the date of the order approving the adjustment of status. An application for adjustment of status, as a preference alien, shall not be approved until an immigrant visa number has been allocated by the Department of State, except when the applicant has established eligibility for the benefits of Public Law 101-238. No appeal lies from the denial of an application by the director, but the applicant, if not an arriving alien, retains the right to renew his or her application in proceedings under 8 CFR part 240. Also, an applicant who is a parolee and meets the two conditions described in Sec. 245.2(a)(1) may renew a denied application in proceedings under 8 CFR part 240 to determine admissibility. At the time of renewal of the application, an applicant does not need to meet the statutory requirement of section 245(c) of the Act, or Sec. 245.1(g), if, in fact, those requirements were met at the time the renewed application was initially filed with the director. Nothing in this section

shall entitle an alien to proceedings under section 240 of the Act who is not otherwise so entitled.

(iii) Under the Act of November 2, 1966. If the application is approved, the applicant's permanent residence shall be recorded in accordance with the provisions of section 1. No appeal lies from the denial of an application by the director, but the applicant, if not an arriving alien, retains the right to renew his or her application in proceedings under 8 CFR part 240. Also, an applicant who is a parolee and meets the two conditions described in Sec. 245.2(a)(1) may renew a denied application in proceedings under 8 CFR part 240 to determine admissibility.

(b) Application under section 2 of the Act of November 2, 1966. An application by a native or citizen of Cuba or by his spouse or child residing in the United States with him, who was lawfully admitted to the United States for permanent residence prior to November 2, 1966, and who desires such admission to be recorded as of an earlier date pursuant to section 2 of the Act of November 2, 1966, shall be made on Form I-485A. The application shall be accompanied by the Permanent Resident Card, Form I-151 or I-551, issued to the applicant in connection with his lawful admission for permanent residence, and shall be submitted to the director having jurisdiction over the applicant's place of residence in the United States. The decision on the application shall be made by the director. No appeal shall lie from his decision. If the application is approved, the applicant will be furnished with a replacement of his Form I-151 or I-551 bearing the new date as of which the lawful admission for permanent residence has been recorded.

(c) Application under section 214(d) of the Act. An application for permanent resident status pursuant to section 214(d) of the Act shall be filed on Form I-485 with the director having jurisdiction over the applicant's place of residence. A separate application shall be filed by each

applicant. If the application is approved, the director shall [[Page 564]] record the lawful admission of the applicant as of the date of approval. The applicant shall be notified of the decision and, if the application is denied, of the reasons therefor. No appeal shall lie from the denial of an application by the director but such denial shall be without prejudice to the alien's right to renew his or her application in proceedings under 8 CFR part 240.

TITLE 8—ALIENS AND NATIONALITY

CHAPTER I—IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE

PART 245—ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE—Table of Contents

8 C.F.R. § 245.6 (2004).

Sec. 245.6 Interview

Each applicant for adjustment of status under this part shall be interviewed by an immigration officer. This interview may be waived in the case of a child under the age of 14; when the applicant is clearly ineligible under section 245(c) of the Act or Sec. 245.1 of this chapter; or when it is determined by the Service that an interview is unnecessary.

(3)

Supreme Court, U.S.
FILED
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No. 03-1085

In the Supreme Court of the United States

SABRI I. SAMIRAH, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that 8 U.S.C. 1252(a)(2)(B) precluded the district court's assertion of jurisdiction, other than habeas corpus jurisdiction, to review the Attorney General's discretionary decision to revoke petitioner's parole.

2. Whether the court of appeals correctly held that the district court lacked jurisdiction over petitioner's habeas corpus petition because petitioner was at liberty outside of the United States.

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In the Supreme Court of the United States

No. 03-1085

SABRI I. SAMIRAH, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 335 F.3d 545. The order of the district court (Pet. App. 17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 2003. A petition for rehearing was denied on October 30, 2003 (Pet. App. 16a). The petition for a writ of certiorari was filed on January 27, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, enacted a number of

immigration-reform measures, one of which is codified at 8 U.S.C. 1252(a)(2)(B). That provision states:

> **Denials of discretionary relief**
>
> Notwithstanding any other provision of law, no court shall have jurisdiction to review—
>
> * * * * *
>
> (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title [pertaining to political asylum].

In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that another jurisdictional bar enacted by IIRIRA, 8 U.S.C. 1252(a)(2)(C), does not preclude a district court from exercising habeas corpus jurisdiction under 28 U.S.C. 2241 to consider a pure question of law presented in connection with a challenge to a final order of removal. See 533 U.S. at 300, 305, 314 n.38. The legal issue involved in *St. Cyr* was whether certain criminal aliens were statutorily ineligible for a discretionary waiver of deportation. In a related case, *Calcano-Martinez* v. *INS*, 533 U.S. 348 (2001), the Court held that Section 1252(a)(2)(C) deprived a court of appeals of jurisdiction to consider the same issue.

2. Petitioner Sabri Samirah is a citizen of Jordan who entered the United States in September 1987 on a student visa. C.A. App. 43. He violated the terms of his visa by failing to maintain his student status. The status violation made it necessary for him to apply to

the Immigration and Naturalization Service (INS)[1] for reinstatement to his student status, which the INS granted in January 1988. *Ibid.* After dropping out of school again (and therefore out of lawful immigration status) for more than two years, petitioner was again reinstated to student status on October 9, 1992. *Id.* at 49. Nine years later, in December 2001, petitioner obtained a Doctor of Philosophy degree from the University of Illinois-Chicago. Gov't C.A. Br. 3-4.

In August 1994, an organization known as the American Middle Eastern League (AMEL) filed a visa petition seeking to classify petitioner as a Special Immigrant Religious Worker. C.A. App. 51. On September 21, 1994, the INS approved the visa petition, *ibid.*, and on September 29, 1994, petitioner filed an application for adjustment of status to that of permanent resident alien, *id.* at 52. Gov't C.A. Br. 4. The INS denied that application on March 29, 1995, on the ground that petitioner had engaged in unauthorized employment and was not in lawful status. C.A. App. 56.

On May 14, 1998, the INS issued AMEL a notice of intent to revoke the approved visa petition on the grounds that petitioner had not proven that he had worked full-time at a religious occupation for two years and that AMEL had not established that it was a bona fide religious organization. C.A. App. 64. On December 8, 1999, the INS revoked AMEL's visa petition approval. *Id.* at 69. AMEL appealed that denial to the

---

[1] Certain functions of the INS, including the parole functions discussed in this case, have since been transferred to the Department of Homeland Security and assigned to United States Immigration and Customs Enforcement in that Department. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (to be codified at 6 U.S.C. 251(2)).

INS Office of Administrative Appeals, which dismissed the appeal on October 11, 2001. *Id.* at 74.

On October 28, 2002, petitioner applied for adjustment of status to that of permanent resident alien. C.A. App. 81. He based that application on a visa petition filed for his wife, Sima Srouri, which was based on her employment as a special education teacher at an Arabic School in Bridgeview, Illinois. *Id.* at 89. The visa petition for petitioner's wife was approved on July 13, 2002. *Id.* at 92. In his application for adjustment of status, petitioner stated: "Please note that my wife and I are eligible to apply for adjustment of status in the United States under INA Sect. 245(i), *based on my prior approved petition*, as well as based on the approved labor certification that was filed on behalf of my wife." *Id.* at 85 (emphasis added). That statement was false because the visa petition of which petitioner was the beneficiary had been revoked and AMEL's administrative appeal of that revocation had been denied a year earlier.

When petitioner filed his application for adjustment of status to that of permanent resident alien on October 28, 2002, he concurrently filed a request for advance parole. C.A. App. 93. Advance parole allows a resident alien, before leaving the United States, to obtain a travel document facilitating his return, if the grant of advance parole remains effective at the time of reentry and the alien is otherwise admissible. See *Balogun* v. *Attorney General*, 304 F.3d 1303 (11th Cir. 2002); *Navarro-Aispura* v. *INS*, 53 F.3d 233, 235 (9th Cir. 1995). Petitioner sought permission to take multiple trips abroad, indicating that he intended to depart in May 2003 for an expected duration of two weeks. C.A. App. 93-94. The INS approved his request for advance

parole on December 4, 2002. Pet. App. 30a-31a. The approval included the following warning:

> If after April 1, 1997, you depart the United States after you were unlawfully present in the United States for more than 180 days before applying for adjustment of status, you may be found inadmissible under section 212(a)(9)(B)(i) of the Act and may not be permitted to enter when you return to the United States to resume the processing of your application. If found inadmissible, you will need to apply and qualify for a waiver of inadmissibility outside of the United States in order for your adjustment of status application to be approved.

Id. at 31a. Petitioner departed the United States on December 28, 2002, four months earlier than the departure date indicated in his advance parole application. *Id.* at 2a.

On January 17, 2003, while petitioner was outside the United States, Brian R. Perryman, District Director of the INS Office in Chicago, Illinois, revoked petitioner's advance parole. The notice of revocation informed petitioner: "The INS has received information indicating that you are a security risk to the United States and therefore, your advance parole authorization is hereby revoked." Pet App. 29a. The notice was served upon petitioner on January 18, 2003, at the INS preinspection station at Shannon Airport, in Ireland. *Id.* at 2a. The INS then denied petitioner admission to the United States because he had been unlawfully present in the United States for more than one year, and because he had no valid travel document. *Ibid.*; see 8 U.S.C. 1182(a)(7)(A)(i).

3. On February 20, 2003, petitioner filed in the district court a complaint, a habeas corpus petition, and

a motion for preliminary injunction, challenging the INS's refusal to permit him to enter the United States and seeking injunctive relief requiring the government to allow his return. His complaint alleged that, although his lack of a travel document rendered him inadmissible, it was unlawful for the INS to make that inadmissibility determination at a foreign pre-inspection station. He demanded that the government issue him a travel document so that he could enter the United States to have an Immigration Judge review his denial of admission. Gov't C.A. Br. 7.

On March 25, 2002, the district court issued a decision granting petitioner a preliminary injunction and ordering the government to issue any documents necessary to permit petitioner to re-enter the United States. Pet. App. 17a. The court acknowledged that it had no jurisdiction to: (i) reverse the INS's advance parole revocation; (ii) order the commencement of removal proceedings; (iii) review the government's determination that petitioner is a security risk; or (iv) grant petitioner adjustment of status. *Id.* at 20a. The court nonetheless held that petitioner had accrued a sufficient stake in the United States to require the government to allow him to enter the United States so that he could be placed in formal removal proceedings. *Id.* at 22a-23a.

On March 27, 2003, the court of appeals granted a stay of the district court's order pending appeal. Pet. App. 14a.

4. The court of appeals reversed the district court's order. Pet. App. 1a-12a. The court first determined that, apart from petitioner's habeas claim, the district court lacked jurisdiction because of 8 U.S.C. 1252(a)(2)(B)(ii). Pet. App. 5a. That provision (with one exception not relevant here) divests courts of jurisdiction to review the Attorney General's discretionary

determinations "under this subchapter." 8 U.S.C. 1252(a)(2)(B)(ii). The court of appeals explained that the Attorney General's decision whether to grant or revoke parole is a discretionary determination subject to the jurisdictional bar established by Section 1252(a)(2)(B)(ii). Pet. App. 5a-6a; see 8 U.S.C. 1182(d)(5)(A).

With respect to petitioner's habeas claim, the court found that the "district court lacked jurisdiction under § 2241 for at least two reasons, neither of which involves § 1252(a)(2)(B)(ii)." Pet. App. 6a. First, the court explained, petitioner was not "in custody" for purposes of the habeas corpus statute because "the United States is exercising no ongoing control, restraint or responsibility over him. As far as the government is concerned, [petitioner] may wander the earth, so long as his wanderings do not lead him to the United States." *Id.* at 7a. The court reasoned that, although petitioner is barred from re-entering the United States, "that restraint, such as it is, only puts him on par with the billions of other non-U.S. citizens around the globe who may not come to the United States without the proper documentation." *Ibid.* As "an alternate ground for * * * holding that the district court lacked § 2241 jurisdiction," the court explained that petitioner is required to name as respondent the custodian with day-to-day control over him, but that neither the INS district director named as respondent, "nor any other governmental official, has 'day-to-day' control over, or can produce," petitioner. *Id.* at 11a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any

other court of appeals. Further review therefore is unwarranted.

1. Petitioner argues (Pet. 6-10) that the court of appeals erred in holding "*sub silentio*" that 8 U.S.C. 1252(a)(2)(B)(ii) precludes any judicial review of his constitutional and statutory challenges to the decision to revoke his parole. The court of appeals, however, did not reach any such holding. The court explained that Section 1252(a)(2)(B)(ii) generally divests federal courts of jurisdiction to review the Attorney General's discretionary determination to revoke parole, Pet. App. 4a-6a, but the court specifically left open the question whether courts retain habeas corpus jurisdiction to review such determinations, *id.* at 6a. Although the court found for separate reasons that habeas corpus jurisdiction is lacking in the circumstances of this case (*id.* at 6a-12a), it specifically did not rest that ruling on Section 1252(a)(2)(B)(ii).

Petitioner therefore errs in relying (Pet. 7-8) on this Court's decision in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001). The Court held in that case that Section 1252(a)(2)(B)(ii) does not foreclose habeas corpus jurisdiction over statutory and constitutional challenges to detention following a final order of removal. 533 U.S. at 688. The court of appeals here did not hold that Section 1252(a)(2)(B)(ii) divested the district court of habeas corpus jurisdiction.

2. Petitioner argues (Pet. 21-27) that the court of appeals erred in concluding that the district court lacked habeas jurisdiction in this case, and contends further (Pet. 10-21) that, if jurisdiction exists, he must be afforded a hearing before his parole can be revoked. Those claims lack merit and do not warrant review.

a. The court of appeals correctly held (Pet. App. 6a-12a) that the district court lacked habeas jurisdiction

because petitioner is not "in custody" within the meaning of the habeas laws. As the court of appeals explained, the government "is exercising no ongoing control, restraint or responsibility over" petitioner, and he is free—as a matter of United States law—to travel anywhere in the world. *Id.* at 7a.

As petitioner observes (Pet. 23), the court of appeals characterized its ruling as disagreeing with the decision of the Ninth Circuit in *Subias* v. *Meese*, 835 F.2d 1288 (1987). See Pet. App. 8a. In fact, however, there is no conflict. In *Subias*, the Ninth Circuit held that the district court *lacked* habeas jurisdiction over a petition filed by an alien who alleged that he was in custody in Mexico as the result of actions by federal officers working in concert with Mexican authorities. 835 F.2d at 1288. Although the court stated in *dictum* that "the requirement of custody is broadly construed to include restriction from entry into the United States," the court found that it was "unclear whether Subias is presently in custody," and the holding of the court was that habeas jurisdiction was lacking because it did not "presently appear [that Subias] is being held by an American official." *Id.* at 1289. The court explained that, "[s]ince Subias' custodian and whereabouts are unknown, jurisdiction is lacking." *Ibid.* Here, petitioner, like the alien in *Subias*, is not being held by an American official.

In addition, the Ninth Circuit has since held in another case, consistent with the decision below, that there was no habeas jurisdiction over a petition filed by a deported alien because the alien was "subject to no greater restraint than any other non-citizen living outside American borders." *Miranda* v. *Reno*, 238 F.3d 1156, 1159 (9th Cir.), cert. denied, 534 U.S. 1018 (2001). The court explained that, although the alien was barred

from returning to the United States because of his conviction for an aggravated felony, "[i]mmigrants who have already been removed * * * do not satisfy the 'in custody' requirement of habeas corpus jurisdiction." *Ibid.* Especially in light of that recent holding, the *dictum* in the Ninth Circuit's previous opinion in *Subias* affords no basis for concluding that the decision below conflicts with the view of the Ninth Circuit.

Petitioner also errs in relying (Pet. 23) on this Court's decision in *Jones* v. *Cunningham*, 371 U.S. 236 (1963). Although the Court observed in *dictum* in that case that the Court had previously held that habeas corpus is available to an alien alleging an entitlement to enter the United States, the habeas cases cited by the Court involved aliens who were at the United States' borders and were being detained there under federal law. See *id.* at 239 & n.9; Pet. App. 10a. Petitioner, by contrast, seeks entry into the United States from abroad without a visa or travel document. In that respect, his claim "only puts him on par with the billions of other non-U.S. citizens around the globe who may not come to the United States without the proper documentation." *Id.* at 7a. As the court of appeals explained, "a proper reading of *Jones* leads to the conclusion that an alien abroad who seeks entry into the United States must * * * suffer some unique restraint that would, in light of historical precedent, constitute custody for the purposes of habeas jurisdiction." *Id.* at 9a. Petitioner is under no such restraint.[2]

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[2] Because the court of appeals correctly found that petitioner is not in custody for purposes of the habeas statute, there is no warrant for considering (Pet. 24-27) whether petitioner has named as respondent a proper custodian who is within reach of the district court's habeas jurisdiction. The court of appeals decisions cited by petitioner (Pet. 26) involved persons who, unlike petitioner, were

b. Because the court of appeals found that the district court lacked habeas jurisdiction, the court did not address petitioner's constitutional and statutory claims on the merits. Accordingly, petitioner's arguments on the merits (Pet. 10-21) afford no basis for review. See, *e.g.*, *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below."). Petitioner's arguments are incorrect in any event.

Petitioner contends (Pet. 10-14) that the Due Process Clause entitles him to a hearing before he may be denied re-entry into the United States. This Court, however, has long held that "an alien who seeks admission to this country may not do so under any claim of right." *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950). Moreover, the nine courts of appeals that have considered the issue have held that aliens have no protected liberty interest in the grant or denial of discretionary immigration relief such as adjustment of status or parole. See *Munoz* v. *Ashcroft*, 339 F.3d 950, 954 (9th Cir. 2003); *Bazuaye* v. *INS*, 79 F.3d 118, 120 (9th Cir. 1996); *United States* v. *Aguirre-Tello*, 353 F.3d 1199, 1205 (10th Cir. 2004); *Mireles-Valdez* v. *Ashcroft*, 349 F.3d 213, 219 (5th Cir. 2003); *Nativi-Gomez* v. *Ashcroft*, 344 F.3d 805, 808 (8th Cir. 2003); *Smith* v. *Ashcroft*, 295 F.3d 425, 429 (4th Cir. 2002); *Huicochea-Gomez* v. *INS*, 237 F.3d 696, 699-700 (6th Cir. 2001);

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physically detained and therefore in custody. Because petitioner is not in custody, this case does not squarely raise the question whether (Pet. 25-26) the Attorney General is a proper habeas respondent. There thus is no need to hold the petition pending the Court's decision in *Rumsfeld* v. *Padilla*, cert. granted, No. 03-1027 (Feb. 20, 2004), which raises the question whether the Secretary of Defense is a proper habeas respondent to a petition filed on behalf of a detained enemy combatant.

Tefel v. *Reno*, 180 F.3d 1286, 1300 (11th Cir. 1999); *Ahmetovic* v. *INS*, 62 F.3d 48, 53 (2d Cir. 1995); *Adras* v. *Nelson*, 917 F.2d 1552, 1558 (11th Cir. 1990); *Achacoso-Sanchez* v. *INS*, 779 F.2d 1260, 1264 (7th Cir. 1985). Accordingly, once the INS revoked petitioner's advance parole, he had no right to enter the United States, for he did not have a valid travel document and in any event he had been unlawfully present in the United States for more than one year. See Pet. App. 31a (citing 8 U.S.C. 1182(a)(9)(B)(i) and warning petitioner that he may be found inadmissible if he attempted to re-enter the United States after having been unlawfully present here for more than 180 days).

Petitioner's reliance (Pet. 12) on *Landon* v. *Plascencia*, 459 U.S. 21 (1982), is misplaced. *Landon* found that a lawful permanent resident (LPR) alien returning from a brief trip abroad was "assimilated" to the status of an alien continuously residing and physically present in the United States, such that the alien had due process rights concerning his return to the United States. See *id.* at 32-34. The "assimilation" doctrine has only been applied to LPRs, and petitioner cites no authority for assimilating a non-LPR (let alone an alien, such as petitioner, who was unlawfully present in the United States) to the status of a continuously present lawful permanent resident alien. Petitioner fails to identify any statutory basis for expanding the assimilation doctrine to nonresident aliens. The statutory "entry" exception described in *Landon* v. *Plasencia*, 459 U.S. at 28-29, applies only to LPRs, and 8 U.S.C. 1101(a)(13)(C), as amended in 1996, fortifies the point by providing that only certain LPRs seeking re-entry to the United States are not treated as seeking admission for the first time.

Moreover, when petitioner applied for student status, and reinstatement to that status, he represented to the INS that he was "an alien having a residence in a foreign country which he has no intention of abandoning." 8 U.S.C. 1101(a)(15)(F). To the extent that petitioner's proposed assimilation for nonresident aliens is based on supposed permanent ties here, it is predicated on a fraud on the immigration system—or at least on a basis that is fundamentally inconsistent with his last lawful status in the United States. See *Patel* v. *INS*, 811 F.2d 377, 382-383 (7th Cir. 1987). An alien's status only becomes "more extensive and secure when he makes preliminary declaration of intention to become a citizen"—that is, at the earliest, when he becomes an LPR, the preliminary and requisite step to citizenship. *Johnson* v. *Eisentrager*, 339 U.S. 763, 770 (1950); *Landon* v. *Plasencia*, 459 U.S. at 32. Petitioner has neither LPR status nor even lawful presence in the United States. Cf. *Kleindienst* v. *Mandel*, 408 U.S. 753, 760 (1972) ("[A]n unadmitted and nonresident alien had no constitutional right of entry to this country as a nonimmigrant or otherwise.").

Petitioner likewise errs in relying (Pet. 12, 28) on *Kwong Hai Chew* v. *Colding*, 344 U.S. 590 (1953). In that case, a permanent resident alien was denied entry upon his return to the United States from a voyage during which his immigration status was revoked. *Id.* at 594-595. The Court held that he was entitled to a hearing to determine his admissibility to the United States. *Id.* at 600-602. The Court pointed out, however, that Kwong's protection under the Fifth Amendment arose from his prior admission to permanent residence, which had established that he did not present a danger to the United States. *Id.* at 602. By contrast, petitioner was never admitted to the United States as a lawful

permanent resident, and his only prior admission was as a student, which status he subsequently violated. Additionally, Kwong was detained by the United States at Ellis Island, New York, which established habeas jurisdiction in the district court. Petitioner, by contrast, is not detained in any location.

Petitioner additionally contends (Pet. 14-21) that he is entitled to a removal proceeding in the United States under 8 U.S.C. 1229a(a)(3). There is no support for petitioner's claim that a returning non-resident alien en route to the United States who is found inadmissible during pre-inspection at a foreign airport must be transported to the United States for removal proceedings. Congress, in 8 U.S.C. 1225a(a)(1), directed the Attorney General to establish "preinspection stations" in certain foreign airports identified "as serving as last points of departure for the greatest numbers of inadmissible alien passengers who arrive from abroad by air at ports of entry within the United States." The purpose of the preinspection process is to "reduce the number of aliens who arrive from abroad by air at points of entry within the United States who are inadmissible to the United States." 8 U.S.C. 1225a(a)(4). The statute provides no procedure for aliens who lack a visa or other valid travel document—and who are therefore denied access to United States territory at preinspection stations—to challenge that denial. Cf. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 214 (1953) (Attorney General may lawfully exclude, without a hearing, alien who formerly resided lawfully in the United States.). Petitioner's recourse, like that of all aliens outside the United States seeking admission, is to submit a visa application to the ap-

propriate United States consulate abroad. See *id.* at 213.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] Contrary to petitioner's suggestion (Pet. 29-30), there is no reason to hold the petition in this case pending the Court's decisions in *Al Odah* v. *United States*, cert. granted, No. 03-343 (Nov. 10, 2003), and *Rasul* v. *Bush*, cert. granted, No. 03-334 (Nov. 10, 2003). *Al Odah* and *Rasul*, unlike this case, involve habeas petitions filed by aliens who are physically detained and are therefore "in custody" for purposes of the habeas laws.

Supreme Court, U.S.
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No. 03-1085

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER'S REPLY BRIEF

ARGUMENT

The Government's Response Misstates Relevant Facts

The government's opposition brief significantly misstates the facts surrounding Dr. Samirah's legal immigration status. This error leads the government to assert incorrectly that Dr. Samirah has defrauded the immigration system by being unlawfully present in the United States, an assertion made repeatedly by the government in its opposition brief. *See* Resp'ts' Opp'n Br. at 13. This is not accurate.

The government's representation of Dr. Samirah's status within the immigration system fails to cite to the record below, and there is nothing in the record to support the

government's allegations. On the contrary, the government made some of these allegations below and *withdrew* them because the government admitted it was wrong. *See* Resp't. Reply Mem. filed in district court (Mar. 24, 2003) at 2 n.3 (admitting that the government's allegation that Dr. Samirah had not obtained his doctorate degree "was not correct"). Now, Dr. Samirah is once again left to defend himself against innuendo and misstatements, which serve mainly to highlight the fact that Dr. Samirah has never had an opportunity to be heard on these matters before the agency. These misstatements demonstrate the dangers facing millions of legal immigrants who cannot rely on the rule of law as set forth by Congress.

Dr. Samirah has never been "unlawfully present" in the United States, as the government repeatedly asserts in its opposition brief. "Unlawful presence" is codified and defined at 8 U.S.C. § 1182(a)(9)(B).[1] While the government points out that Dr. Samirah's first application for adjustment of status was denied on March 29, 1995, its argument ignores the fact that his application was denied without prejudice to refiling under 8 U.S.C. § 1255(i), and that Dr. Samirah did in fact file a second I-485 application under that section less than 45 days after the denial of the first application. *See* App. at 1a. This second application for adjustment of status, filed on April 12, 1995, and stamped as received by the INS on May 10, 1995, has not been denied to date. *Id.*

This is of no small significance for the underlying case because the pending application kept Dr. Samirah in lawful

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[1] The effective date provisions of § 1182(a)(9)(B) are uncodified. The uncodified provisions provide that the term "unlawful presence" does not apply to presence in the U.S. prior to April 1, 1997, when 8 U.S.C. § 1182(a)(9)(B) became effective. *See* § 301(b)(3) of Div. C. of Pub. L. 104-208. If the government means to imply that Dr. Samirah was unlawfully present prior to 1997, such a suggestion has no support in the law.

status during the years in question. While a properly filed application for residency is pending, an immigrant is considered to be in a period of stay authorized by the Attorney General, as the agency itself has decided. *See* App. at 15a. Under the agency's interpretation, while a "[p]roperly filed, affirmative application for adjustment of status under section 245 of the Act" is pending, the applicant is considered to be in a period of stay authorized by the Attorney General. *Id.* at 0123. There is no dispute that Dr. Samirah's second application for adjustment of status was properly filed and was an affirmative application for residency. Consequently, the government's argument that Dr. Samirah was "unlawfully present" in the United States is without merit.

The fact that the government obtusely categorizes Dr. Samirah as an alien unlawfully present in the United States without even the slightest acknowledgment of his affirmative application for adjustment of status merely underscores the fact that Dr. Samirah has received no constitutionally sufficient process. The government's willingness to ignore the record emphasizes the need for Congress's requirement that such determinations be reviewed independently.

The Seventh Circuit's Decision Precludes Courts from Exercising Jurisdiction Over Constitutional and Statutory Questions

Dr. Samirah asserted jurisdiction under 28 U.S.C. § 1361 (mandamus); 28 U.S.C. § 1331 (federal question) in conjunction with 5 U.S.C. § 701 *et seq.* (the Administrative Procedure Act); and 28 U.S.C. § 2241 (habeas). The Seventh Circuit held that the first two jurisdictional grounds were foreclosed by 8 U.S.C. § 1252(a)(2)(B)(ii), and that the § 2241 claim failed because Dr. Samirah was not "in custody."[2] The government argues that the Seventh Circuit's

[2] *See Samirah v. Ashcroft*, 335 F.3d 545, 549-50 (7th Cir. 2003).

decision does not run afoul of this Court's holding in *Zadvydas v. Davis*, 533 U.S. 678 (2001), where this Court rejected a broad application of § 1252(a)(2)(B) to questions of statutory construction: "[t]he aliens here . . . do not seek review of the Attorney General's exercise of discretion; rather, they challenge the extent of the Attorney General's authority . . . [a]nd the extent of that authority is not a matter of discretion." *Id.* at 688.

Dr. Samirah challenges the extent of the government's authority to exclude him without notice or hearing. This argument does not relate to the government's discretionary decision to revoke advance parole. The fallacy of the Seventh Circuit's holding relating to § 1252(a)(2)(B)(ii) is perhaps more evident if the order of the analysis is reversed: (1) that habeas review was unavailable because Dr. Samirah is no longer "in custody" for purposes of § 2241; and (2) that no other review of Dr. Samirah's statutory and constitutional challenge was available due to 8 U.S.C. § 1252(a)(2)(B)(ii). Considered in this order, it is clear that the Seventh Circuit misreads § 1252(a)(2)(B)(ii) as precluding review of Dr. Samirah's statutory and constitutional claims without even addressing traditional presumptions in favor of review of constitutional and statutory questions.

At the time Dr. Samirah traveled abroad with the government's permission, he had both a liberty interest and a property interest in his pending application for residency. The government argues that *Landon v. Plascencia*, 459 U.S. 21 (1982), stands only for the proposition that returning permanent residents have due process rights, but this is an obtuse reading of that case. *Landon* was premised on the unexceptionable proposition that "[t]he constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances." *Id.* at 34. This led to this Court's express adoption in *Landon* of a "sliding scale" test for due process. *Id.* at 32-33. Dr. Samirah does not argue

that he has all of the rights of a permanent resident, but an individual in his circumstance has the right to notice and an opportunity to be heard.[3]

Finally, Dr. Samirah reiterates that Congress has required by statute that the government follow the procedures outlined in 8 U.S.C. § 1229a before it deports or excludes an alien. 8 U.S.C. § 1229a(a)(3). The government is correct in noting that the Seventh Circuit did not rule on this argument, but it is the absence of such a ruling that is so troubling about this case. For purposes of jurisdiction, Dr. Samirah's statutory arguments must be taken as true; yet, the Seventh Circuit Court held that even if Dr. Samirah had been excluded from the United States in violation of the Constitution and in violation of the statute passed by Congress, federal courts had no jurisdiction to rectify the situation.

The Constitution gives Congress the authority to set "uniform rules" regarding naturalization (U.S. Const. art. I, sec. 8, cl. 4) but the rule adopted by the Court of Appeals would

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[3] The government incorrectly relies on *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206 (1953), to characterize Dr. Samirah as an alien on the threshold of initial entry. *See* Resp'ts' Opp'n Br. at 14. But *Mezei* is illustrative for the opposite reason. In *Mezei*, the alien had traveled abroad without authorization, and was gone for a period of 19 months. *Id.* at 214. Moreover, he was excluded pursuant to an Act of Congress. Here, by contrast, Dr. Samirah traveled with advance authorization from the government, was outside the country for less than a month, and was excluded (as must be assumed for purposes of jurisdiction) in direct *contravention* of statute. These facts are far more similar to those in *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), where an alien departed the country with the government's knowledge and approval. The alien in that case was found to have a due process right to a hearing before being excluded or deported from the country. *Id.* at 600 ("We do not regard the constitutional status which petitioner indisputably enjoyed prior to his voyage as terminated by that voyage. From a constitutional point of view, he is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien").

permit the "uniform" rules set by Congress to be disregarded by the Executive at will. If the courts have no power to reverse Executive actions that are unlawful or unconstitutional, then there is no effective check on the authority of the Executive, and Congress's constitutional right to enact uniform laws is encumbered.

Such a ruling is pernicious and corrosive, requiring immediate attention by this Court. Already, the Seventh Circuit has applied *Samirah* to foreclose review of a visa revocation in *El-Khader v. Monica*, holding that El-Khader's argument that the government had applied the wrong legal standard was unreviewable because of the discretion involved in the statute. __ F.3d __, 2004 WL 909161, at *1 (7th Cir. April 29, 2004). The court found no relevant distinction between El-Khader's visa petition revocation and Dr. Samirah's advance parole revocation, *id.* at *3; arguments of pure law in both cases were held beyond judicial oversight because of overall discretion given to the agency.

In the Seventh Circuit, as demonstrated by *El-Khader*, an immigrant cannot obtain review even of errors of law or constitutional violations, due to a provision that purports only to restrict review of discretionary decisions. Such a conclusion runs flatly contrary to this Court's recent jurisdictional holdings in *INS v. St. Cyr*, 533 U.S. 289, 313-14 (2001); *Zadvydas*, 533 U.S. at 687-88, and *Demore v. Kim*, 538 U.S. 510, 516-17 (2003) (citing *Webster v. Doe*, 486 U.S. 592, 603 (1988), and *Johnson v. Robison*, 415 U.S. 361, 367 (1974)), all of which found jurisdiction to review constitutional arguments and arguments of pure law.

Dr. Samirah challenges the constitutionality of the government's interpretation of the statute and the authority of the government to exclude him by the means at issue herein. Longstanding precedent presumes that the courts have the capacity and the obligation to rule on such questions. The Executive is inclined to insulate its actions from judicial

oversight, but liberty and the rule of law require that such inclinations be checked by the courts of a free people.

CONCLUSION

Petitioner respectfully requests this Court to GRANT the Petition for Certiorari, and to REMAND this case to the United States Court of Appeals for the Seventh Circuit for further action in the case.

Respectfully submitted,

CHARLES ROTH
MIDWEST IMMIGRANT AND HUMAN RIGHTS CENTER
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Chicago, Illinois 60604
(312) 660-1613

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* *Counsel of Record*

Counsel for Petitioner

APPENDIX

APPENDIX

U.S. DEPARTENT OF JUSTICE
Immigration and Naturalization Service

Application to Register Permanent
Residence or Adjust Status

START HERE—Please Type or Print

Part 1. Information about you.

Family Name: SAMIRAH
Given Name: SABRI
Middle Initial: I
Address: c/o
Street Number and Name: 4342 N. Kedvale
Apt: 1B
City: Chicago
State: Ill.
Zip Code: 60641
Date of Birth: 1/1/1967
County of Birth: Jordan
Social Security: 338-78-2964
A # (if any): 73 354 759
Date of Last Arrival: 10/31/90
I-94 #: 47627968800
Current INS Status: F-1
Expires on: 12/31/99

Part 2. Application Type (check One)

Am applying for adjustment to permanent resident status because:

a. ☒ an immigrant petition giving me an immediately available immigrant visa number has been approved (attach a copy of the approval notice), or a relative, special immigrant juvenile, or special immigrant military visa petition filed with

this application will give me a immediately available visa number if approved.

b. My spouse or parent applied for adjustment of status or was granted lawful permanent residence in an immigrant visa category which allows derivative status for spouses and children.

c. I entered as a K-1 fiance(e) of a U.S. citizen whol I arried within 90 days of entry, or I an the K-2 child of such a fiance(e) (attach a copy of the fiance(e) petition approval notice and the marriage certificate).

d. I was granted asylum or derivative asylum status as the spouse or child of a person granted asylum and am eligible for adjustment.

e. I am a native or citizen of Cuba admitted or paroled into the U.S. after January 1, 1959, and thereafter have been physically present in the U.S. for at least 1 year.

f. I am the husband, wife, or minor unmarried child of a Cuban described in (e) and am residing with that person, and was admitted or paroled into the U.S. after January 1, 1959, and thereafter have been physically present in the U.S. for at least 1 year.

g. I have continuously resided in the U.S. since before January 1, 1972.

h. Other-explain _____.

Am already a permanent resident and an applying to have the date I was granted permanent residence adjusted to the date I originally arrived in the U.S. as a immigrant or parolee, or as of May 2, 1964, whichever is later, and (check One)

i. I am a native or citizen of Cuba and meet the description in (e), above.

j. I am the husband, wife or minor unmarried child of a Cuban, and meet the description in (f), above.

Continued on back

City/Town/Village of birth: Amman
Current occupation: Student
Your mother's first name: Mariam
Your father's first name: Ibrahim
Give your name exactly how it appears on your arrival/Departure Record (Form 1-94): Sabri Samirah
Place of last entry into the U.S. (City/State): New York, N.Y.
Were you inspected by a U.S. Immigration Officer?
☐Yes ☐ No
In what status did you last enter? (visitor, Student, exchange, alien, crewmen, temporary worker, without inspection, etc.)
F-1 (Student)
Nonimmigrant Visa Number: 001499
Consulate where Visa was issued: Amman-Jordan
Date Visa was issued: 10/22/1990
Sex: ☒ Male ☐ Female
Marital Status: ☒ Married ☐ Single ☐ Divorced
☐ Widowed
Have you ever before applied for permanent resident status in the U.S.? ☐ No ☒ Yes (give date and place of filing and final disposition): 9/29/94 Chicago, Denied

List your present husband/wife, all of your sons and daughters (if you have none, write "none". If additional space is needed, use separate paper).

Family name: SROURI
Given name: SIMA
Middle Initial: K
Date of Birth: 2/6/67
Country of birth: Jordan
Relationship: wife
Applying with you: ☒ Yes ☐ No
Family name: Samirah
Given name: Ibraheem
Middle initial: S

Date of birth: 8/20/91
Country of birth: U.S.A.
Relationship: son
Applying with you: ☒ Yes ☐ No
Family name: Samirah
Given name: Khaled
Middle initial: S
Date of birth: 8/22/93
Country of birth: U.S.A.
Relationship: Son
Applying with you? ☒ Yes ☐ No

List your present and past membership in or affiliation with every political organization, association, fund, foundation, party, club, society, or similar group in the United States or in any other place since your 16th birthday. Including any foreign military service in this part. If none, write "none". Include the name of organization, location, dates of membership from and to, and the nature of the organization. If additional space is needed, use separate paper.

None

Part 3. Processing information. (continued)

Please answer the following questions. (If your answer is "yes" on any one of these questions, explain on a separate piece of paper. Answering "yes" does not necessarily mean that you are not entitled to register for permanent residence or adjust status).

1. Have you ever, in or outside the U.S.:

   a. knowingly committed any crime of moral turpitude or a drug-related offense for which you have not been arrested?

   b. been *arrested*, cited, charged, indicted, fined, or imprisoned for breaking or violating any law or ordinance, excluding traffic violations?

c. been the beneficiary of a pardon, amnesty, rehabilitation decree, other act of clemency or similar action?

d. exercised diplomatic immunity to avoid prosecution for a criminal offense in the U.S.?

☒ Yes ☐ No

2. Have you received public assistance in the U.S. from any source, including the U.S. government or any state, county, city, or municipality (other than emergency medical treatment), or are you likely to receive public assistance in the future?

☐ Yes ☒ No

3. Have you ever:

a. within the past 10 years been a prostitute or procured anyone for prostitution, or intend to engage in such activities in the future?

b. engaged in any unlawful commercialized vice, including, but not limited tc, illegal gambling?

c. knowingly encouraged, induced, assisted, abetted or aided any alien to try to enter the U.S. illegally?

d. illicitly trafficked in any controlled substance, or knowingly assisted, abetted or colluded in the illicit trafficking or any controlled substance?

☐ Yes ☒ No

4. Have you ever engaged in. conspired to engage in, or do you intend to engage in, or have you ever solicited membership or funds for, or have you through any means ever assisted or provided any type of material support to, any person or organization that has ever engaged or conspired to engage, in sabotage, kidnapping, political assassination, hijacking, or any other form of terrorist activity?

☐ Yes ☒ No

5. Do you intend to engage in the U.S. in:

a. espionage?

b. any activity a purpose of which is opposition to, or the control or overthrow of, the Government of the United States, by force, violence or other unlawful means?

c. any activity to violate or evade any law prohibiting the export from the United States of goods, technology or sensitive information?

☐ Yes ☒ No

6. Have you ever been a member of, or in any way affiliated with, the Communist Party or any other totalitarian party?

☐ Yes ☒ No

7. Did you, during the period March 23, 1933 to May 8, 1945, in association with either the Nazi Germany or any organization or government associated or allied with the Nazi Government of Germany, ever order, incite, assist or otherwise participate in the persecution of any person because of race, religion, national origin or political opinion?

☐ Yes ☒ No

8. Have you ever engaged in genocide, or otherwise ordered, incited, assisted or otherwise participated in the killing of any person because of race, religion, nationality, ethnic origin, or political opinion?

☐ Yes ☒ No

9. Have you ever been deported from the U.S. or removed from the U.S. at government expense, excluded within the past year, or are you now in exclusion or deporation proceedings?

☐ Yes ☒ No

10. Are you under order of civil penalty for violating section 274C of the Immigration Act for use of fraudulent documents, or have you, by fraud or willful misrepresentation of a material fact, ever sough to procure, or procured, a visa, other documentation, entry into the U.S., or any other immigration benefit?

☐ Yes ☒ No

11. Have you ever left the U.S. to avoid being drafted into the U.S. Armed Forces?

☐ Yes ☒ No

12. Have you ever been a J nonimmigrant exchange visitor who was subject to the 2 year foreign residence requirement and not yet complied with that requirement or obtained a waiver?

☐ Yes ☒ No

13. Are you withholding custody of a U.S. Citizen child outside the U.S. from a person granted custody of the child?

☐ Yes ☒ No

14. Do you plan to practice polygamy in the U.S.?

☐ Yes ☒ No

Continued on back

Part 4. Signature. (Read the information on penalties in the instructions before completing this section. You must file this application while in the United States.)

I certify under penalty of perjury under the laws of the United States of America that this application, and the evidence submitted with it, is all true an correct, authorize the release of any information from my records which the Immigration and Naturalization Service needs to determine eligibility for the benefit, I am seeking.

Signature: /s/ Sabri Samirah
Print You Name: SABRI SAMIRAH
Date: 4/12/95
Daytime Phone Number: (312) 481-0352

Please Note: If you do not completely fill out this form, or fail to submit required documents listed in the instructions, you may not be found eligible for the requested document and this application may be denied.

Part 5. Signature of person preparing form if other than above. (Sign Below)

I declare that I prepared this application at the request of the above person and it ti based on all information of which L have knowledge.

Signature:
Print Your Name:
Date:
Day time Phone Number:
Firm Name and Address:

U.S. DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

Supplement A to Form I-485

START HERE—Please Type or Print

Part 1. Information about Applicant

Family Name: SAMIRAH
First Name: SABRI
Middle Name: IBRAHIM
Address: c/o
Street Number and Name: 4342 N. Kedvale
Apt. Suite: 1.B
City: Chicago
State or Privince: ILL.
Country: USA
Zip/Postal Code: 60641
INS: A#
Date of Birth: 1/1/67
Country of Birth: Amman-Jordan

Part 2. Basis for Eligibility (check one)

1. On Form 1-485, Part 2, I checked application type (check one):

a. ☒ An immigrant petition
(go to #2)
b. ☐ My spouse or parent applied
(go to #2)
c. ☐ I entered as a K-1 finance
Stop Here. Do not file this form.
d. ☐ I was granted asylum
Stop Here. Do not file this form.
e. ☐ I am a native or citizen of Cua
Stop Here. Do not file this form.
f. ☐ I am the spouse or child of a Cuban
Stop Here. Do not file this form.

g. ☐ I have continuously resided in the U.S.
Stop Here. Do not file this form.
h. ☐ Other
Go to #2.
i. ☐ I am already a permanent resident
Stop Here. Do not file this form.
j. ☐ I am already a permanent resident and an the spouse or child of a Cuban
Stop Here. Do not file this form.

2. I have filed Form I-360; and I am applying for adjustment of status as a special immigrant juvenile court dependent (check one):

☐ Yes Stop Here. Do not file this form.
☒ No No Go to #3.

3. I have filed Form I-360; and I am applying for adjustment of status as a special immigrant who has served in the United States Armed Forces *(check one)*:

☐ Yes Stop Here. Do not file this form.
☒ No No Go to #4.

4. I last entered the United States *(check one)*:

☐ Legally as a crewman (D-1/D-2 visa).
Go to #11.
☐ Without inspection.
Go to #11.
☐ Legally in transit without visa status.
Go to #11.
☐ Legally without a visa.
Go to #5.
☐ Legally as a parolee.
Go to #5.
☒ Legally with another type of visa (show type F-1)
Go to #5.

5. I last entered the United States legally without a visa as a visitor for tourism or business; and I am applying for adjustment of status as the spouse, unmarried child less than 21 years old, parent, widow or widower of a United States citizen *(check one)*:

☐ Yes Stop Here. Do not file this form.
☒ No Go to #6.

6. I last entered the United States legally as a parolee, or with a visa (except as a crewman), or as a Canadian citizen without a visa; and I am applying for adjustment of status *(check one)*:

☐ As the spouse, unmarried child less than 21 years old, parent, widow or widower of a United States citizen.
Stop Here. Do Not File This Form.
☐ As a special immigrant retired international organization employee or family member of an international organization employee or as a special immigrant physician; and I have filed Form I-360.
Stop Here. Do Not File This Form.
☒ Under some other category. Go to #7.

7. I am a national of the (former) Soviet Union, Vietnam, Laos or Cambodia who last entered the United States legally as a public interest parolee after having been denied refugee status; and I am applying for adjustment of status under Public Law 101-167 *(check one)*:

☐ Yes Stop Here. Do Not File This Form.
☒ No Go to #8.

8. I have been employed in the United States after 01/01/77 without INS authorization *(check one)*:

☐ Yes Go to #9.
☐ No Go to #10.

9. I am applying for adjustment of status under the Immigration Nursing Relief Act (INRA); I was employed without INS authorization only on or before 11/29/90; and I have always maintained a lawful immigration status while in the United States after 11/05/86 *(check one):*

☐ Yes Stop Here. Do Not File This Form.
☒ No Go to #10.

10. I am now in lawful immigration status; and I have always maintained a lawful immigration status while in the United States after 11/05/86 *(check one):*

☐ Yes Stop Here. Do Not File This Form.
☐ No, but I believe that INS will determine that my failure to be in or maintain a lawful immigration status was through no fault of my own or for technical reasons. Stop Here. Do Not File This Form, and attach an explanation to your Form I-485 application.
☐ No. Go to #11.

11. I am unmarried and less than 17 years old *(check one):*

☐ Yes. Stop Here. File This Form and Form I-485. Pay only the fee required with Form 1-485.
☒ No. Go to #12.

12. I am the unmarried child of a legalized alien and am less than 21 years old, or I am the spouse of a legalized alien; and I have attached a copy of my receipt or approval notice showing that I have properly filed Form I-817, Application for Voluntary Departure under the Family Unity Program *(check one):*

☐ Yes. Stop Here. File This Form and Form I-485. Pay only the fee required with Form 1-485.
☒ No. Go to #13.

13. File This Form and Form I-485. You must pay the additional sum:

$130.00—Fee required with Form I-485* *and*
$650.00—Additional sum under section 245(i) of the Act

$780.00—Total amount you must pay.

* If you filed Form I-485 separately, attach a copy of your filing receipt and pay only the additional sum of $650.00. In #11 and/or #12, show the answer you would have given on the date you filed Form I-485.

Part 3. Signature. Read the information on penalties in the instructions before completing this section. If someone helped you prepare this petition he or she must complete Part 4.

I certify under penalty of perjury under the laws of the United States of America, that this application, and the evidence submitted with it, is all true and correct. I authorize the release of any information from my records which the Immigration and Naturalization Service needs to determine eligibility for the benefit I am seeking.

Signature /s/ Sabri Samirah
Print Your Name: SABRI SAMIRAH
Date: 4-12-95
Daytime Telephone No.: (312) 481-0352

Please Note: If you do not completely fillout this form or fail to submit required documents listed in the instructions, you may not be found eligible for the required document and this application may be denied.

Part 4. Signature of person preparing form if other than above. *(Sign Below)*

I declare that I prepared this application at the request of the above person and it is based on all information of which I have knowledge.

Signature:
Print Your Name:
Date:
Daytime Telephone No.:
Firm Name and Address:

U.S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

HQADN70/21.1.24-P
AD 00-07
425 I STREET N.W.
WASHINGTON, D.C. 20336

[SEAL]
Office of the Executive Associate Commissioner

MEMORANDUM FOR REGIONAL DIRECTORS

DEPUTY EXECUTIVE ASSOCIATE COMMISSIONER, IMMIGRATION SERVICES DIVISION

ACTING DIRECTOR, OFFICE OF INTERNATIONAL AFFAIRS

/s/_____

FROM: MICHAEL A. PEARSON
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Period of stay authorized by the Attorney General after 120-day tolling period for purposes of section 212 (a)(9)(B) of the immigration and Nationality Act (the Act). (AD 00-07)

This memorandum addresses issues relating to the 3 and 10 year bars to admission under section 212(a)(9)(B)(i)(l) and (U) of the act and the decision to designate as a period of stay authorized by the Attorney General the entire period during which a timely filed, non-frivolous application for extension of stay (E/S) or change of status (C/S) is pending with the Service, provided the alien has not engaged in any unautho-

rized employment. This period of stay authorized by the Attorney General covers the 120-day tolling period described in section 212(a)(9)(B)(iv) of the Act, and continues until the date the Service issues a decision.

By way of background, section 121(a)(9)(B)(ii) of the Act states that an alien who is present in the United States without admission or parole, or who remains in the United States beyond the period of stay authorized by the Attorney General, accrues unlawful presence towards the 3- and 10- year bars under section 212(a)(9)(B)(i)(l) and (II) of the Act. Section 212(a)(9)(B)(iv) of the Act is a tolling provision that covers certain nonimmigrants. If an alien has timely filed a nonfrivolous application for E/S or C/S, the first 120 days of unlawful presence are not counted towards the 3-year bar under section 212(a)(9)(B)(i) of the Act. Section of the Act further states the alien must have been lawfully admitted or paroled into the United States, and must not have been employed without authorization before the E/S or C/S application was filed or while it was pending.

Although legislative history is silent regarding the intent of the 120-day tolling period, an inference may be drawn that Congress expected the Service to adjudicate the petitions within such a timeframe. However, due to unprecedented workload, in many instances the Service has been unable to adjudicate a timely filed application for E/S or C/S within the 120-day envisioned by Congress.

Under current Service policy, if a decision is not rendered within the tolling period, aliens admitted to the United States until a specific date begin accruing unlawful presence on the 121st.day after the expiration of their Form I-94. Because of the current backlogs, which in some cases extend beyond six months, aliens who remain in the United States while the C/S or E/S is pending may incur a 3-year or 10-year bar to admission if the application is ultimately is denied.

Therefore, in order to alleviate problems aliens may encounter concerning unlawful presence through no fault of their own, the Service has determined that nonimmigrants who were admitted until a specific date and who apply for C/S or E/S and whose applications have been pending beyond the 120-day tolling period should be considered to be in a period of stay authorized by the Attorney General, if certain requirements are met. Because these requirements are the same as those for tolling under section 212(a)(9)(B)(iv) of the Act, the Service has further determined that the period of stay authorized by the Attorney General covers the E/S or C/S application for the entire period that it is pending.

AS a particle matter, we note that this policy applies only to those nonimmigrants who were admitted until a specific date and whose I-94 has expired while the E/S or C/S application is pending. This is because nonimmigrants admitted for duration of status (D/S) do not begin accruing unlawful presence until a status violation is found. Refer to the Service's memorandum dated September 19, 1997, 96 Act #058, for a discussion of the Service's policy on unlawful presence as it relates to nonimmigrants admitted D/S.

This memorandum is being issued simultaneously with a separate memorandum, HQADN 70/12–P, amending the Service's 1/14/99 guidance on section 222(g), which is found in Chapter 15 of the Inspector's Field Manual (IFM). These policies and procedures are effective immediately and will be included in the AFM and in the IFM, respectively, in the next release of INSERTS.

A new Chapter 30.I(d) is added in the AFM to read as follows:

> (d) Unlawful Presence under Section 212(a)(9)(B) of the Act. (1) The 3-and 10-year bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act do not apply to:

Applicants for adjustment of status under section 202(b) of NACARA

Applicants for adjustment of status under— of HRIFA; and Registry applicants under section 249 of the Act.

(2) Counting For Unlawful Presence for Nonimmigrants. An alien who remains in the United States beyond the period of stay authorized by the Attorney General is unlawfully present and becomes subject to the 3 or 10 year bars to admission under section 212(a)(9)(B)(l)(l) and (ll) of the Act. Under current Service policy, unlawful presence is counted in the following manner for nonimmigrants.

(A) Nonimmigrants Admitted until a Specific Date. Nonimmigrants admitted until a specific date begin accruing unlawful presence on the date the period of admission authorized by the Service expires, as noted on the arrival document issued at the port-of-entry.

(B) Nonimmigrants Admitted Duration of Status (D/S). Nonimmigrants admitted to the United States for D/S begin accruing unlawful presence on the date the Service finds a status violation while adjudicating a request for another immigration benefit, or on the date an immigration judge finds a status violation in the course of proceedings. If, however, the immigration judge concurrently issues voluntary departure and the alien complies with the order by making a timely departure, no unlawful presence accrues. See sections(dx2) and (dx5) of this chapter regarding voluntary departure as a period of stay authorized by the Attorney General.

(3) Period of Stay Authorized by the Attorney General. The Service has also designated the following as periods of stay authorized by the Attorney General:

Voluntary departure;

Refugee status;

Asylee status;

Grants of withholding or deferral of removal under the United Nations Convention Against Torture;

Legalization and special agricultural worker applications for lawful temporary residence which are pending through administrative appeal;

Grants of withholding or suspension of deportation, or cancellation of

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(2)
Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SABRI I. SAMIRAH,

Petitioner,

v.

JOHN ASCHROFT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF CONCERNED IMMIGRANTS' RIGHTS AND ARAB AND MUSLIM CIVIL RIGHTS ORGANIZATIONS IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

The Muslim Bar Association (MBA) is a non-profit corporation founded in 1997 to represent the unique interests of over 100 American-Muslim attorneys in Illinois. MBA's corporate purposes include advancing and improving the administration of justice, advancing the delivery of legal services to all communities, particularly the American-Muslim community, and serving the general welfare of the community through educational programs in all fields of law. In furtherance of these purposes, MBA has been at the forefront of civil liberties issues in Illinois. In the aftermath of the tragic September 11, 2001 terrorist attacks, Illinois has seen too many instances of religious and racial profiling, and a general targeting of Muslim and Arab communities as part of overzealous investigations and prosecutions in the "war on terror." MBA has worked to safeguard the civil liberties of American-Muslims in Illinois who, like Dr. Samirah, have been victims of the sweeping generalizations employed in assessing terrorism and other issues of "national security." MBA joins its fellow *amici curiae* in support of Dr. Samirah's petition for certiorari and urges this Court to grant certiorari so that it may review the government's actions vis-à-vis Dr. Samirah and reject such actions that result in an undermining of the American-Muslim confidence in the rule of law in the United States.

The Council of Islamic Organizations of Greater Chicago (CIOGC) is a federation of approximately 50 Islamic centers, mosques, academic institutions, schools, civic and professional organizations, and social service groups. Through its

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[1] Pursuant to Rule 37.2 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk. This brief was not written in whole or in part by counsel for a party, and no person or entity other than the *amici curiae* has made a monetary contribution to the preparation and submission of this brief.

member organizations, the Council represents the collective interests and viewpoints of over 400,000 individual Muslims in Chicago's greater vicinity. The CIOGC has no stake in the parties to this litigation or the result of this case; however, it is concerned about the disproportionate impact of the Justice Department's actions on the American-Muslim community. Since September 11, 2001, American-Muslims have been subjected to an unprecedented number of incidents of anti-Muslim bias, exhibited in various forms and perpetrated by various individuals and groups at all levels of society. Among the challenges facing the American-Muslim community in Chicago are detentions and deportations of Muslim men and families, in many cases without due process of law and via the use of secret evidence. Additionally, the CIOGC is deeply concerned that aliens and citizens alike may lose the ability to bring constitutional and statutory challenges to actions taken by the Attorney General of the United States as a result of the Appellate Court's decision in this case.

The Illinois Coalition for Immigrant and Refugee Rights (ICIRR) is a membership organization comprised of more than 130 community and faith-based groups, service providers, educational institutions, and other agencies that work with and represent the diverse immigrant populations. ICIRR educates and organizes immigrant and refugee communities to assert their rights and responsibilities, promotes citizenship and civic participation, monitors and analyzes immigrant-related issues, and informs the general public about the positive contributions of newcomers to the quality of life in the Unites States. ICIRR has been deeply concerned with the impact of myriad laws, policy changes, and other initiatives undertaken by the federal government in the aftermath of the September 11, 2001 terrorist attacks on immigrants and refugees. ICIRR is especially critical of initiatives that have targeted Muslim, Arab, and South Asian immigrants in the U.S.; initiatives that have been cloaked in secrecy and that have created a climate of fear and

intimidation in the immigrant communities. ICIRR believes that the INS' secretive decision to exclude Dr. Samirah, violated not only his due process rights, but also set a terrifying precedent for arbitrary and unaccountable decision making by the Department of Homeland Security. For these reason, ICIRR joins with its fellow *amici curiae* in urging this Court to grant Dr. Samirah's petition for certiorari.

The American-Arab Anti-Discrimination Committee (ADC) is a civil rights organization committed to defending the rights of people of Arab descent and promoting their rich cultural heritage. ADC, which is non-sectarian and non-partisan, is the largest American-Arab grassroots and civil rights organization in the United States. It was founded in 1980 by former United States Senator James Abourezk; has 38 chapters nationwide, and members in all 50 States. ADC is at the forefront in addressing discrimination and bias against Arab Americans and Muslims wherever it is practiced. Through its various efforts, ADC has made great strides in correcting anti-Arab stereotypes, prejudice, and fear. Since September 11, 2001, the American-Arab and Muslim communities have been subjected to a wave of policies and actions that single them out for particularly harsh or difficult treatment. These have ranged from lengthy pretextual detentions, to private acts of retaliation and violence documented by the Equal Employment Opportunity Commission (EEOC), FBI, and the Office of the Inspector General at the U.S. Department of Justice. In many cases, the discrimination and prejudice has manifested in more subtle and insidious ways, such as minor effectual changes in the immigration policies and procedures that, either directly or indirectly target Arab and Muslim immigrants for increased security, based solely on their national origin, religion, and or gender. ADC is committed to eradicating even these more insidious forms of discrimination in the interest of preserving the constitutional guarantees of Due Process and Equal Protection to all, inasmuch as it views those guarantees as

essential rights that form the foundations of this nation. ADC believes that only by safeguarding these rights for individuals can the courts affirm the solidly American principles of constitutional democracy that have been justly championed by this nation for decades.

The principal purpose of this brief is to explain to the Court the unconstitutional and patently unfair method by which the government has excluded Dr. Samirah from the United States and to explain the profound ramifications such actions will have on all immigrants in the United States, and particularly on those immigrants who are Muslim or are of Arab descent.

SUMMARY OF ARGUMENT

The Executive Branch's revocation of Dr. Samirah's advance parole authorization, while he was literally a few hours away from returning to the United States, with no advance notice or due process of law sets a terrifying precedent for immigrants who avail themselves of the advance parole process, and particularly for Muslim and Arab immigrants who feel like they are being singled out unfairly for no reason other than their faith and national origin. By denying Dr. Samirah his basic constitutional and statutory rights, the government's message is loud and clear—that in the wake of the tragic events of September 11, 2001, and the ensuing war on terrorism, it no longer has to abide by the rule of law—particularly when it comes to the civil liberties of Muslims or Arab residing in the United States. The Seventh Circuit's answer that it has no jurisdiction over this case—as Dr. Samirah was no longer on U.S. soil when his advance parole was revoked—is highly unsatisfying and completely irreconcilable against this Court's mandate that foreign nationals who have lived in the United States for some amount of time and have established roots here, are entitled to certain due process protections. Furthermore, by abdicating its vital judicial oversight role, the Seventh Circuit had given tacit approval to the government's highly unjust and uncon-

stitutional actions. Given the importance of the issues to the American-Muslim community and the grave practical consequences of the Seventh Circuit's decision on immigrants' rights, this Court's review is undoubtedly warranted.

ARGUMENT

I. THE GOVERNMENT'S EXCLUSION OF DR. SAMIRAH VIOLATES LONG STANDING CONSTITUTIONAL AND STATUTORY RIGHTS ENJOYED BY FOREIGN NATIONALS.

There can be no doubt that foreign nationals,[2] like Dr. Sabri Samirah, who have resided in the United States for some significant amount of time are afforded the right to life, liberty, and property, which cannot be deprived without due process of law as dictated by the Fifth Amendment of the U.S. Constitution. In fact, with respect to immigration related proceedings, Congress has created certain procedures and regulations which are meant to ensure that the government conducts a hearing where foreign nationals can object to the government's decision to exclude or deport them from the United States. 8 U.S.C. § 1229a.

The Court of Appeals for the Seventh Circuit failed to address both the constitutional rights and the statutory rights that were ignored when the federal government prevented Dr. Samirah from returning back to his home in Illinois after it expressly permitted him to visit his sick mother in Jordan. *Samirah v. O'Connell*, 335 F.3d 545 (7th Cir. 2003). The government violated Dr. Samirah's most basic rights to procedural due process as it decided to exclude him on the basis of certain evidence, yet it refused to allow him an opportunity to examine such evidence. The government's actions also violated Section 240 of the Immigration and

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[2] The term "foreign national" is used synonymously with the term "alien."

Nationality Act, which clearly provides for certain procedures including a formal hearing, that are due to any foreign national whose admission or removal is being determined. 8 U.S.C. § 1229a. The government's action circumvented both the U.S. Constitution and immigration statutes by summarily revoking the permission it gave Dr. Samirah to leave the country as he waited for the completion of his application to adjust his status to that of a permanent resident. Dr. Samirah and many other foreign nationals who rely on and have embraced the immigration statutes and the U.S. Constitution will suffer a tremendous loss if the government's action is sanctioned by the Court. The appellate court's decision must be reversed to unequivocally affirm that we are a nation that believes in the rule of law and not the arbitrary and unaccountable exercise of government power.

A. The Fifth And Fourteenth Amendment Of The U.S. Constitution Grants Procedural Due Process To Foreign Nationals Who Are Deprived Of Their Life, Liberty, Or Property.

Courts have consistently ruled that foreign nationals who live in the United States are entitled to procedural due process rights guaranteed by the Fifth and Fourteenth Amendments of the U.S. Constitution. *Landon v. Plascencia*, 459 U.S. 21 (1982). From the moment foreign nationals arrive in the country they benefit from enumerated constitutional rights including procedural due process. *See Id.* at 34 (granting due process rights to respondent who was detained for transporting illegal aliens across the Mexican border because she had major interests at stake including the right to stay and work in the United States and the right to rejoin her immediate family); *Zadvydas v. Davis*, 533 U.S. 678 (2001) (ruling that the Due Process Clause applied to petitioners who were removed from the country on the basis of criminal convictions because "once an alien enters the country, the legal circumstances change[]" even if the entrance was

illegal); *Chew v. Colding*, 344 U.S. 590, 598 (1953) (ruling that even if statute or regulation permitted the exclusion of an alien who was a lawful resident, the alien would still be given a fair opportunity to be heard). Foreign nationals are granted these rights because as they lead their lives in the United States they become part of our national fabric by establishing new homes, joining the work force, raising their families, paying taxes, purchasing goods and services, and participating in civic activities. Liberty interests are created when immigrants make the United States their home and these interests expand as immigrants spend more time solidifying their roots in our nation. *See Landon*, 459 U.S. at 32-33 (granting constitutional protections to resident alien who had left the country because she had already gained admission and began to develop "ties that go with permanent residence"); *Johnson v. Eisentrager*, 339 U.S. 763, 770-771 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society").[3]

Dr. Samirah and many other foreign nationals, like him, have not only created a home for themselves in this country, but have also contributed to and become part of their respective communities all across the country. Dr. Samirah has studied and earned degrees at DePaul University and University of Illinois at Chicago. He has engaged himself in the civic opportunities available in the United States by establishing many non-profit organizations that encourage Muslims to involve themselves in the political system to

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[3] *See also* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knaff and Ignatz Mezei*, 143 University of Penn. L.R. 933, 1020-1022 (1995) (advocating the constitutional analysis used by Supreme Court in *Landon v. Plasencia*, which granted due process protection to aliens based on their contacts with our country).

further their various causes. In 1998, he founded the United Muslim American Association, an organization whose very mission is to encourage American Muslims to be politically active. He has met with a number of political leaders, including First Lady Laura Bush. He has garnered the respect of many lawmakers and has testified before the Illinois Senate Health and Welfare Committee. His civic involvement is truly an example of an immigrant becoming an "American" by validating the best principles of American democracy and its political freedoms that are sorely lacking in many parts of the world. Perhaps most importantly, Dr. Samirah and his wife, a grade school teacher, have established the deepest roots imaginable by raising three U.S. born children within the American-Muslim community in Chicago. In the particular context of Dr. Samirah's deep roots in our country, especially his family ties, it is undeniable that the government has deprived him of very strong interests in remaining in the United States.

There are many foreign nationals across the country that are similarly situated as Dr. Samirah in that they have lived in this country as law-abiding residents and have applied for adjustment of status to become permanent residents. Further, many of them have also been granted advance parole to attend to personal affairs. The government cannot be permitted to ignore the Due Process Clause by revoking advance parole without allowing any form of grievance. *See Chew*, 344 U.S. at 601 (an alien's "status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken" without a hearing).

B. Immigration Statutes And Regulations Dictate That Immigrants Granted Advance Parole Cannot Be Excluded Without Procedures Listed In 8 U.S.C. § 1229a.

The government's exclusion of Dr. Samirah without any sort of hearing runs contrary to the statutory and regulatory

scheme created by the authority of Congress to determine the deportation and exclusion of all immigrants. The language of 8 U.S.C. § 1229a(a)(3) cannot be more clear:

> Unless otherwise specified in this chapter, a proceeding under this section shall be the *sole and exclusive procedure* for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States.

(emphasis added). The procedures listed in § 1229a require that all aliens whose inadmissibility or deportability are being determined must be given a proceeding in front of an immigration judge. *Id.* at § 1229a(a)(1). Aliens have also been granted certain rights during these proceedings including 1) a right to counsel at their own expense; 2) a reasonable opportunity to examine evidence used against them and to cross examine any witnesses presented by the government; and 3) a right to have a complete record of all testimony and evidence at the proceeding. *Id.* at § 1229a(a)(4)(A-C). Dr. Samirah was not allowed to participate in a proceeding in front of an immigration judge nor was he allowed to examine any evidence against him. The government summarily revoked his advance parole and now argues that it did not have to follow the § 1229a procedures because Dr. Samirah was temporarily out of the country, albeit with the government's complete approval and permission.

The statutes and regulations governing advance parole are meant to protect the interests of foreign nationals who reside in the United States legally but do not have permanent resident status. Advance parole is designed to provide foreign nationals, who need to temporarily depart the country for various reasons, an opportunity to re-enter the country without jeopardizing their immigration application process. *See* Report to Congress, Use of the Attorney General's Parole Authority Under the Immigration and Nationality Act Fiscal

Years 1998-1999. The statute that gives the Attorney General the power to grant paroles indicates that after the parole period is complete, the alien's case would resume at the point where it was before the parole was granted. 8 U.S.C. § 1182(d)(5)(A). *See also* 8 C.F.R. § 212.5(e)(2)(i) ("upon accomplishment of the purpose for which parole was authorized * * * he or she shall be restored to the status he or she had at the time of parole").

§ 1229a procedures are not meant to be and should not be used as tools of oppression by the government—as was the case in Dr. Samirah's situation—to deny the very due process rights they are meant to protect. *See Navarro-Aispura v. INS*, 842 F. Supp. 1225, 1229 (N.D. Cal. 1993) (stating that district director had no authority to use advance parole to arbitrarily require an alien to go through proceedings inconsistent with his status at the time of parole grant).

As is common among advance parolees, Dr. Samirah was awaiting for the adjudication of his adjustment of status application when he was permitted to visit his ailing mother in Jordan. However, unlike other advance parolees, he did not resume the application process for his adjustment of status when he tried to return to the country. Far from being "restored to the status" he had when he was granted parole, he was told that his advance parole was revoked and he was not given deportation, exclusion, or any other proceedings to contest the government's decision. In *Patel*, a foreign national, while in the middle of an application process to adjust his status to a non-preference investor, was granted advance parole to visit his ailing father. *Patel v. Landon, Jr.*, 739 F.2d 1455 (9th Cir. 1984). After he returned to the U.S., his application was denied and he was placed in exclusion proceedings. The court agreed with petitioner's argument that he should be adjudicated in deportation proceedings because he had a valid visa before he left the country. The court stated that since his departure was innocent and brief,

his application must be adjudicated without regard to his departure. *Id.*, 739 F.2d at 1457. Other advance parolee cases also involve situations where the parolee is allowed to adjudicate his or her status in a formal proceeding. *See Sillah v. Davis*, 252 F.Supp.2d 589, 593-594 (W.D. Tenn. 2003) (alien put into deportation proceedings after his parole was revoked, treating him as an arriving alien because that was the status he had when he was granted parole).

The government's exclusion of Dr. Samirah circumvents the procedures dictated by 8 U.S.C. § 1229a. By revoking the permission it granted Dr. Samirah to visit his ailing mother, while his adjustment of status application was still pending, the government has not only ignored the law, but also has acted in a patently unfair manner by grossly abusing its discretionary power over advance parolees. The government's action affects not only Dr. Samirah, but also the increasing number of foreign nationals that are seeking to adjust their status. They all have the right to rely on advance parole without worrying that the government may arbitrarily pull the plug on their adjustment applications without the benefit of any hearing. To preserve these statutory rights and expectations, the Court must not permit the government's violation.

II. IF THE GOVERNMENT'S EXCLUSION STANDS, FOREIGN NATIONALS WILL NO LONGER BE ABLE TO RELY ON THE GOVERNMENT'S GRANT OF ADVANCE PAROLE.

Immigrants continue to flock to the United States for the same reasons they have done so in the past: opportunity and freedom from tyrannical regimes who have no respect for the rule of law. In 2002 alone there were 1,063,732 new

immigrants in the United States.[4] A vast majority of these new immigrants (679,305) were already living in the country and became immigrants through adjustment of status. Like Dr. Samirah, most of these immigrants are productive members of society with jobs and families.[5] For many years, the number of foreign nationals applying for adjustment to permanent resident status has increased. Predictably, this had lead to an increase in the number of advance paroles requested and granted by the government. For example, in 2003 there were 23,582 advance paroles granted compared to 8,344 in 1998.[6]

These numbers show the increasing importance of the decision in front of the Court. Advance paroles play a very important role in many foreign nationals' lives. The government has realized the increase in number of foreign nationals awaiting decisions regarding their applications for permanent residency. With this is mind, the government has repeatedly clarified its policy of granting advance parole to applicants for "bona fide business or personal reason[s]."[7] Like Dr. Samirah, these applicants rely on advance parole to take care of personal and business matters. They also rely on

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[4] Office of Immigration Statistics, U.S. Dept. of Homeland Security, *2002 Yearbook of Immigration Statistics*, Table 4 (2003).

[5] In fact, according to a survey conducted by the U.S. Census Bureau, 69% of all non-citizens over the age of 16 are part of the work force compared to 51% of citizens (native and naturalized). U.S. Census Bureau, *Current Population Survey* (March 2002).

[6] *2002 Yearbook of Immigration Statistics* at p. 90.

[7] James A. Puleo, Office of Programs, Immigration and Naturalization Service, *Issuance to Applicants for Adjustment of Status under Section 245* (April 20, 1995) (citing public interest in revising advance parole guidelines due to increase in applications for adjustment of status). *See also* Paul W. Virtue, Office of Programs, Immigration and Naturalization Service, *Advance Parole for Adjustment of Status Applicants Under Section 245; Issuance of Form I-512* (August 15, 1997).

the promises made by the government that they can resume their applications once they return to the United States. So far, Dr. Samirah has seen the government turn its back on its promise to allow him to resume his application to become a permanent resident in complete contravention of his statutory, regulatory, and constitutional rights. The appellate court's decision allows the government to violate the law and deprive foreign nationals of long standing rights that they have cherished for many years. It must not be allowed to stand.

III. POLICY CONSIDERATIONS IN THIS CASE GIVE RISE TO EQUAL PROTECTION CONSIDERATIONS THAT WARRANT A GRANT OF WRIT OF CERTIORARI

The post-September 11, 2001, treatment of ordinary Muslims in America by the government leaves no doubt that the executive branch has embarked on a systematic and deliberate assault on the civil liberties of American Muslims. From September 11, 2001 to November 2003, the change in number of deportation orders of immigrants, from primarily Muslim countries, had risen 31.4%, while the rate for immigrants from other countries saw only a 3.4% growth. *See* Simpson, Cam, *et. al.*, *Immigration Crackdown Shatters Muslim Lives,* Chicago Tribune, Nov. 16, 2003. American Muslims have been arrested as "enemy combatants" on U.S. soil and held incommunicado for years without ever being charged or allowed a meeting with an attorney. *See Padilla v. Rumsfeld,* No. 03-2235, 2003 U.S. App LEXIS 25616 (2nd Cir. December 18, 2003). The Attorney General singled out thousands of immigrants from predominantly Muslim countries for "special registration" procedures. *See* Department of Justice Press Release, *Attorney General Ashcroft announces implementation of the first phase of the national security entry-exit registration system,* Aug. 12, 2002. Further, a thorough search of case history finds no other instance of the INS revoking Advance Parole while an applicant who is

domiciled in the United States is out of the country. The fact that this singular act of circumventing the judicial hearing requirement has been directed toward a well-known member of the Islamic community is not lost on American Muslims. The District Court reviewing Dr. Samirah's case appropriately described the government's revocation in absentia as a "kind of 'gotcha' quality" event that was "demeaning to this country." *See Samirah v. Ashcroft, et al.*, No. 03-C-129, slip op (N.D.Ill. March 25, 2003).

Taken in context with other government actions that have negatively impacted the American-Muslim community, the Appellate Court's refusal to review Samirah's case is almost as disturbing as the government's advance parole revocation. The chilling implication for the American-Muslim community is that the government can take any action against them and they may have no legal means for recourse. *Samirah v. O'Connell,* 335 F.3d 545 (7th Cir. 2003). If we do reach that point, the "dangers to human liberty" from total judicial acquiescence to the Executive Branch "are frightful to contemplate." *Ex parte Milligan*, 71 U.S. 2, 125 (1866).

While it is true that in its war on terrorism, the President "has a discretion vested in him [to protect our country];" however, the fact remains that the Constitution imposes limits on such discretion in order to "guard the foundations of civil liberty against the abuses of unlimited power." *Brown v. United States*, 12 U.S. (8 Cranch) 110, 153 (1814) (Story, J., dissenting); *see, also, Milligan*, 71 U.S. at 126. Even assuming that the government is acting with best of motives, this Court has previously cautioned that "'[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. * * * The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.'" *Chandler v. Miller*, 520 U.S. 305, 322 (1997) (quoting *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissent-

ing)). Further, that "[t]his nation * * * has no right to expect that it will always have wise and humane rulers * * *. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln." *Milligan*, 71 U.S. at 126.

As a country, we value highly the notion that equal protection, liberty, and justice is for all people, regardless of race, creed or color. Our history provides only one modern-day example of the judiciary upholding a law authorizing the disparate treatment of a specific ethnicity. *Korematsu v. United States*, 323 U.S. 214 (1944). The shameful event of interning Japanese-Americans left a deep scar on our national character, one that was recently addressed with a Presidential apology and reparations.[8] We also have the unfortunate legacy of Jim Crow laws that institutionalized discrimination against African-Americans. The perpetuation of this untenable discrimination strained our democracy and led to violent societal upheavals nearly forty years ago. However, the consequences of this past discrimination still cause great problems in our country. The dilemma facing American Muslims today is the same wolf, discrimination, in different clothing.

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[8] President Clinton formally apologized to interned Japanese-Americans recognizing the grave injustice done to them and also acknowledging the shameful legacy this event case upon our nation. *See Letter from President Bill Clinton of October 1, 1993*. ("Over fifty years ago, the United States Government unjustly interned, evacuated, or relocated you and many other Japanese Americans. Today, on behalf of your fellow Americans, I offer a sincere apology to you for the actions that unfairly denied Japanese Americans and their families fundamental liberties during World War II. In passing of the Civil Liberties Act of 1988, we acknowledged the wrongs of the past and offered redress to those who endured such grave injustice. In retrospect, we understand that the nation's actions were rooted deeply in racial prejudice, wartime hysteria, and a lack of political leadership. We must learn from the past and dedicate ourselves as a nation to renewing the spirit of equality and our love of freedom. Together, we can guarantee a future with liberty and justice for all.")

The guilt or innocence of Dr. Samirah is not being debated here, neither is his right to free speech or freedom of association. What is being debated is the government's complete disregard of Dr. Samirah's due process rights. While it is true that there is nothing overtly in the record to show that Dr. Samirah was singled out for being an Arab or Muslim; it is equally true that the government's singling out of Dr. Samirah is yet another example of Muslims and Arabs residing in the United States being singled out by the government and subjected to a separate and unequal standard of justice. Some enemies of America, who to the misfortune of American Muslims label themselves with the same faith as patriotic Muslims do, are described as hating our American freedoms and way of life. *See* President George Bush, *Address to the Nation* (September 20, 2002). Therefore, it would be a tragic irony if we validated this hatred attributed to our enemies by in turn denigrating our own freedoms and commitment to a diverse, tolerant society by denying such values to American Muslims.

Our nation has explicitly stated that it is trying the win the hearts and minds of Muslims around the world. Ironically, there was even a State Department sponsored ad-campaign depicting the extremely positive lives of American Muslims that was broadcast throughout the Muslim world.[9] Yet the Executive Branch's domestic agenda, as illustrated in Dr. Samirah's case, is beginning to paint an entirely different story. Furthermore, it would be naïve to assume that the post-

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[9] Claire Cozens, *US scraps Muslim ad campaign*, GUARDIAN, UK, Jan. 17, 2003. ("But the so-called "Shared values campaign, conceived by the former advertising executive Charlotte Beers, proved controversial with critics describing it as straightforward propaganda. Youssef Ibrahim, a senior fellow at the US council on foreign relations, described the campaign as 'extremely poor.' 'It was like this in the 1930s and the government was running commercials showing happy blacks in America,' he told the Wall Street Journal.")

September 11th domestic treatment of American Muslims is not being followed by a global audience. *See* Khalid Hassan, *Justice Department should apologize to Arabs, Muslims: ACLU*, DAILY TIMES, PAKISTAN, Apr. 14, 2004; Andrew Gumbel, *The Disappeared*, INDEPENDENT, UK, Feb. 26, 2002. ("Since 11 September last year, up to 2,000 people in the United States have been detained without trial, or charge, or even legal rights. The fate of most is unknown. Andrew Gumbel investigates a scandal that shames the land of the free.") By upholding the rule of law in this case, the Court has the opportunity to affirm to the rest of the world, that America has learned from its past mistakes and shall uphold the rights of the disenfranchised, particularly when it is not expedient or popular to do so. "The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government." *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion). To put it simply, the Court cannot let the most vulnerable among us, immigrants in general, and particularly those of Arab or Muslim backgrounds like Dr. Samirah, be deprived of liberty without due process of law in order to falsely convince ourselves that our nation is more secure as a result. As our founding father Benjamin Franklin warned us long ago, "[t]hose who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety." Benjamin Franklin, AN HISTORICAL REVIEW OF THE CONSTITUTION AND GOVERNMENT OF PENNSYLVANIA, title page (1759) (Arno Press reprint 1972).

The message the Appellate Court's decision sends to the American Muslim community is that even if the law is on your side, you will lose. The community perceives that as long as the government has a policy, written or unwritten, that all Muslims are "suspect," it will use any kind of

"gotcha" tactics to get its way, even using absurd technical arguments at the appellate level to undo sound legal decisions. This necessarily instills a sense of futility in the community, that even if you play by the rules—you still lose—as the government can break the rules whenever it wants.

The perception of many in the American-Muslim community familiar with this case is that Dr. Samirah became a target for adverse government action because of his political activism. If the government is able to deny fairness and equity to such a prominent figure among American Muslims, the result will be a chilling of political involvement and speech on the community as a whole. As Americans, we understand that there is a value in voicing our politics and that the exchange of differing opinions in the marketplace of ideas makes us a stronger society. Therefore, to generate such fear in a minority that it would eradicate their voice from our national conversation would only serve to make us weaker as a nation. In practical terms, upholding unjust actions similar to those taken against Dr. Samirah, will inevitably lead a decline in relations between the government and a vital domestic community.

The vilifying of an unpopular minority in uncertain times to rally the support of the majority is not a new tactic, either in our society or many others. This tactic does serve a political end, otherwise it would not be attempted so frequently. Rhetorically, if not substantively, it provides the government the argument that it is zealously ensuring our security.[10] In the name of protecting our nation against future

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[10] The government revoked Samirah's advance parole because the INS allegedly received information that he was a "security risk to the United States." *Samirah v. O'Connell*, 335 F.3d 545 (7th Cir. 2003). In addition, the government denied exercising "ongoing control, restraint or responsibility over him" and that Samirah may "wander the earth" so long as he does not wander back to the United States. *Ibid.* However, in the context

terrorist attacks, the government has already significantly curtailed the rights of Muslims in the United States by denying them equal access to justice. This is not a solution, or rather, it is not an American solution. It is the very nature of our system of laws to protect the innocent. We choose not to paint our population in broad-brush strokes, because to do so would betray our very character.

Among the first descriptions that one learns of America, whether it be in elementary school or in a naturalization class, is that our country is "a great melting pot." We are people of many faiths, cultures, and ethnicities. Every immigrant population has contributed its values to our national fabric and, at the same time, assimilated in to American society. As a nation, we recognize a great worth in the open sharing of culture. If, however, we force a people to go into collective hiding for its own security, we violate the principles of the melting pot. American Muslims who are great contributors to our society will think twice before contributing again. The opportunity to assimilate will be lost and a thorough disenfranchisement of an entire class of Americans will ensue.

When arriving upon our shores, most immigrants leave behind the pandemic mistrust of government that exists throughout much of the globe. They arrive to find a representative government accountable to its citizenry, a government that believes in the rule of law. The duty of the Court is to ensure that the relationship between the leadership and those being led remains sacred. If, as in the present case, the government is able to turn back on its word with absolutely no fear of oversight by the judiciary, segments of our population will believe that this government is no

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of the U.S. government arresting terror suspects around the globe and imprisoning them in Guantanamo Bay, Cuba, it is incomprehensible that the government would allow someone who is truly a national security risk to "wander the earth" with no control over them whatsoever.

different than the ones they left behind. The "pernicious" notion that a Constitutional mandate "can be suspended during any of the great exigencies of government * * * leads directly to anarchy or despotism." *Milligan*, 71 U.S. at 121.

We request that this Court recognize that the ramifications of any decision made in the instant case will have an impact on immigrants and an entire, *de facto*, suspect class of Americans. In the proverbial sense, there is more here than meets the eye. The decision of the Seventh Circuit Court of Appeals to preclude itself from reviewing the case at bar is not only erroneous as a matter of law, but threatens to set our nation backwards, to repeat discredited and shameful mistakes from our past.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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